Supreme Court, U.S.
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No. ____

IN THE

Supreme Court of the United States

THE GOODYEAR TIRE & RUBBER COMPANY,
Petitioner,

v.

FREDERIC V. MALEK,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a federal magistrate have jurisdiction to act in a case when the clerk's office assigns the case directly to the magistrate—as opposed to assigning the case to an Article III district judge who can then *refer* the matter to the magistrate—as required by Article III of the Constitution, the Federal Magistrates Act, and the Rules of Civil Procedure?

2. Under the Federal Magistrates Act, an appeal from a magistrate's ruling on a dispositive matter with the parties' consent is to the Court of Appeals for the Circuit within which the magistrate sits. In this case, was Petitioner's appeal to the Fourth Circuit appropriate given that the magistrate's ruling is on an issue dispositive in this case and this route of review was the "closest" to the routes of review set forth in the Magistrates Act and Rules of Civil Procedure?

STATEMENT PURSUANT TO RULE 29.6

Petitioner is a publicly held Ohio corporation with no parent companies. There are no companies holding 10% or more of Petitioner's stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
STATEMENT PURSUANT TO RULE 29.6	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
STATUTES AND RULES INVOLVED	2
STATEMENT OF THE CASE	2
A. Litigation Involving "Entran II" Hose	4
B. Goodyear's Retention of Rowan & Blewitt	5
C. The Subpoena Issued in *Payne v. Goodyear*	5
D. The Subpoena Issued in *Malek v. Goodyear*	6
E. Subject Matter Jurisdiction Below	7
REASONS FOR GRANTING THE WRIT	7
I. MAGISTRATE PORETZ LACKED JURISDICTION TO ENTER THE APRIL 30 ORDER	7
A. Nondispositive Matters Without Consent: Section 636(b)(1)(A) and Rule 72(a)	8
1. The Case Was Never Assigned to a District Judge and Then Referred to Magistrate Poretz	9
2. Magistrate Poretz's April 30 Order Resolved a "Dispositive" Issue in This Case	11
3. An Appeal Was Filed in the District Court Within Ten Days of the April 30 Order	13

TABLE OF CONTENTS

	Page
B. Dispositive Matters Without Consent: Section 636(b)(1)(B) and Rule 72(b)	15
C. Dispositive Matters with Consent: Section 636(c) and Rule 73	17
II. THE ISSUE IS IMPORTANT	18
CONCLUSION	21
APPENDICES	
U.S. CONST. art. III, § 1	10a
U.S. CONST. amend. V	11a
28 U.S.C. § 132	12a
28 U.S.C. § 137	12a
28 U.S.C. § 636	13a
28 U.S.C. § 1631	22a
FED. R. CIV. P. 72	23a
FED. R. CIV. P. 73	24a

TABLE OF AUTHORITIES

CASES	Page
American Stock Exch. v. Mopex, Inc., 215 F.R.D. 87 (S.D.N.Y. 2002)	11
Batiste v. Catoe, No. 01-6892, 2001 U.S. App. LEXIS 23425 (4th Cir. Oct. 30, 2001)	13
Columbia Record Prods. v. Hot Wax Records, 966 F.2d 515 (9th Cir. 1992)	17
In re Copper Market Antitrust Litigation, 200 F.R.D. 213 (S.D.N.Y. 2001)	18, 19
Dixon v. Francis, No. 00-7658, 2001 U.S. App. LEXIS 2774 (4th Cir. Feb. 26, 2001)	4, 10
Fawcett v. McRobert, 326 F.3d 491 (4th Cir. 2003)	21
In re Ford Motor Co., 110 F.3d 954 (3d Cir. 1997)	20
Goodyear Tire & Rubber Co. v. Malek, No. 03-MC-08 (E.D. Va.)	6, 7, 9, 11
Goodyear Tire & Rubber Co. v. Payne, No. 02-MC-51 (E.D. Va.)	6
In re Grand Jury Subpoenas Dated March 24, 2003, 265 F. Supp. 2d 321 (S.D.N.Y. 2003)	20
Henry v. Tri-Services, 33 F.3d 931 (8th Cir. 1994)	17
Jack in the Box v. Jackinthebox.org, No. 00-913-A, 2001 U.S. Dist. LEXIS 9583 (E.D. Va. Apr. 17, 2001) (Poretz, M.J.)	16
Malek v. Goodyear Tire & Rubber Co., No. 02-B-1772 (D. Colo.)	2, 4, 6, 7, 15
NLRB v. Frazier, 966 F.2d 812 (3d Cir. 1992)	12, 13
In re Oral Testimony of a Witness, 182 F.R.D. 196 (E.D. Va. 1998)	12
Parks v. Collins, 761 F.2d 1101 (5th Cir. 1985)	17
Payne v. Goodyear Tire & Rubber Co., No. 01-10118-NG (D. Mass.)	5, 15

TABLE OF AUTHORITIES—Continued

Page

Reynaga v. Cammisa, 971 F.2d 414 (9th Cir. 1992) 4, 10, 11
Upjohn Co. v. United States, 449 U.S. 383 (1981) 18
Virginia Elec. & Power Co. v. Westmoreland-LG&E Partners, 526 S.E.2d 750 (Va. 2000) 18
Willis v. Bank of Am., No. 98-15027, 1998 U.S. App. LEXIS 31478 (9th Cir. Dec. 11, 1998) 13

CONSTITUTIONAL PROVISIONS, STATUTES & RULES

U.S. CONST. art. III, § 2 8
U.S. CONST. amend V 2
28 U.S.C. § 132 8
28 U.S.C. § 137 8
28 U.S.C. § 631 *et seq.* 3, 7
28 U.S.C. § 636(b)(1) 8, 16
28 U.S.C. § 636(b)(1)(A) 7, 8
28 U.S.C. § 636(b)(1)(B) 8, 13, 15
28 U.S.C. § 636(c) 8, 15
28 U.S.C. § 636(c)(1) 17
28 U.S.C. § 636(c)(3) 17
28 U.S.C. § 1254(1) 2
28 U.S.C. § 1332(a)(1) 7
28 U.S.C. § 1631 ..... 4, 13
FED. R. APP. P. 4(d) 4, 13
FED. R. CIV. P. 30(b)(6) 1, 6
FED. R. CIV. P. 45(c)(3)(A) 7
FED. R. CIV. P. 72(a) 2, 7
FED. R. CIV. P. 72(b) 2, 8, 13, 15, 16
FED. R. CIV. P. 73 ..... 8, 15
FED. R. CIV. P. 73(a) 17
FED. R. CIV. P. 73(b) 17
FED. R. CIV. P. 73(c) 17

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES — Page

15B CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3914.24 (2d ed. 1992) 14

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PETITION FOR A WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on August 6, 2003.

OPINIONS BELOW

The lower courts' opinions are set forth in orders. The Magistrate Judge denied Petitioner's Motion to Quash by Order entered April 30, 2003, and compelled Rowan & Blewitt to produce the subpoenaed documents and a Rule 30(b)(6) witness. (A. 6-7a.) The Magistrate Judge stayed the effect of that Order pending appeal by Order entered May 29, 2003. (A. 4-5a.) The Fourth Circuit dismissed Petitioner's

appeal by Order entered August 6, 2003 (A. 2-3a), and denied its Petition for Rehearing or Rehearing *en Banc* by Order entered September 23, 2003. (A. 1a.) None of the lower courts' rulings are reported.

JURISDICTION

Judgment was entered in the District Court on April 30, 2003. (A. 6a.) Judgment was entered in the Court of Appeals on August 6, 2003. (A. 2a.) A timely Petition for Rehearing or Rehearing *en Banc* was denied September 23, 2003. (A. 1a.) This Court has jurisdiction pursuant to Section 1254(1) of the Judicial Code, 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

Section 1 of Article III of the United States Constitution, the Fifth Amendment to the United States Constitution, Sections 132, 137, 636, and 1631 of the Judicial Code, and Rules of Civil Procedure 72 and 73 are reproduced in the Appendix at pp. 10-25a.

STATEMENT OF THE CASE

This case is ancillary to a case pending in the District of Colorado in which a group of homeowners—including Respondent—filed suit against Goodyear. *Malek v. Goodyear Tire & Rubber Co.*, No. 02-B-1772 (D. Colo.). Plaintiffs in that case seek property damages due to an alleged failure of Entran II hose manufactured by Goodyear that was used as a component part in radiant in-floor heating systems.

The case coming to this Court was commenced by Petitioner as a miscellaneous action to quash a subpoena Respondent issued out of the Eastern District of Virginia to obtain documents and other materials from Rowan & Blewitt, a public relations/litigation support firm Petitioner hired in connection with the nationwide litigation involving Entran II hose.

By Order dated August 6, 2003, the Fourth Circuit (Widener, Traxler & Hamilton, JJ.) dismissed Goodyear's appeal, holding that the magistrate's April 30, 2003, Order from which the appeal was taken is "nondispositive" and was required to be appealed first to the District Court within ten days. (A. 2a.) By that, the panel overlooked significant legal issues and the ruling stands in direct conflict with decisions from another panel in that Circuit and decisions from other Circuits because:

1. The case below was never assigned to an Article III judge and then referred to a magistrate as required by the Constitution, the Federal Magistrates Act, 28 U.S.C. § 631 *et seq.*, and the Rules of Civil Procedure as a prerequisite before a magistrate can exercise jurisdiction;

2. the magistrate's April 30 Order is fully "dispositive" in this case, leaves absolutely nothing further to be resolved, and the clerk of court on the same date marked on the docket "case closed";

3. the most appropriate route of appeal was to the Court of Appeals and not the District Court because the magistrate's April 30 ruling was indeed dispositive and because it was not a "report and recommendation"; and

4. Goodyear's notice of appeal was in fact filed with the District Court within ten days of the April 30 Order to "cover all bases" so that if it is determined that an appeal must first be considered by the District Court, the proper recourse is to deem the appeal pending in that Court, not dismiss the appeal outright.

Indeed, given how the District Court clerk's office mishandled the assignment of this matter, and given the action the magistrate thereafter took, Goodyear took every

step possible to protect its rights. To dismiss the appeal outright was so grossly unfair that it would constitute a deprivation of procedural due process.

Accordingly, if this Court concludes that an appeal to the District Court is the appropriate route of appellate review—notwithstanding the fact that the case was never assigned to a district judge and then referred to a magistrate, notwithstanding the fact that the issue resolved by the April 30 Order is indeed "dispositive," and notwithstanding the fact that an appeal was filed in the District Court within ten days—the appropriate course of action is to remand to the District Court with instructions that the appeal lies in that court. *See* 28 U.S.C. § 1631; *cf.* FED. R. APP. P. 4(d).

A writ of certiorari is appropriate because these material points of law were not even addressed by the Court of Appeals in its August 6 or September 23 Orders and its decision is directly contrary to other authority, such as the Fourth Circuit's decision in *Dixon v. Francis*, 2001 U.S. App. LEXIS 2774 (4th Cir. Feb. 26, 2001), and the Ninth Circuit's decision in *Reynaga v. Cammisa*, 971 F.2d 414 (9th Cir. 1992), as discussed below.

A. Litigation Involving "Entran II" Hose

Respondent Frederic Malek is one of a number of plaintiffs in *Malek v. Goodyear Tire & Rubber Co.*, No. 02-B-1772 (D. Colo.). Plaintiffs in that case seek various types of property damages due to an alleged defect in Goodyear's "Entran II" hose that was installed in their homes, buildings, or other structures. Entran II is a rubberized hose used in hydronic radiant in-floor heating systems manufactured by the Chiles Power Supply Company, *d/b/a* Heatway Systems.

A number of similar cases have been filed against Goodyear throughout the United States, including cases in New England, New Mexico, New York, Michigan, California, Pennsylvania, and New Jersey. Respondent's

attorneys in this case—Holland & Hart—are lead counsel in a number of the other lawsuits.

B. Goodyear's Retention of Rowan & Blewitt

In June of 2000, after 19 lawsuits had been filed against it involving Entran II, Goodyear and its national counsel at the time retained the public relations firm of Rowan & Blewitt to provide litigation support. Goodyear's attorney explained the nature of and basis for that retention in an affidavit submitted below:

> Because Rowan & Blewitt was retained after litigation involving Entran II hose had been commenced against Goodyear, one of its functions was to act essentially as an in-house public relations department with respect to the litigation and in that regard to provide advice and guidance on how (a) Goodyear and its attorneys could attempt to counter and combat the stigma that Plaintiffs' attorneys were attempting to create with regard to the presence of Entran II, while (b) at the same time ensuring that those public relations activities did not in any way adversely impact on Goodyear's defense in the litigation.

C. The Subpoena Issued in *Payne v. Goodyear*

The attorneys from Holland & Hart representing Respondent in this case also represent the plaintiffs in *Payne v. Goodyear*, No. 01-10118-NG (D. Mass.). Plaintiffs in that case seek certification of a class of all homeowners in the six New England states who have Heatway systems with Entran II hose.

Plaintiffs in *Payne v. Goodyear* issued two subpoenas to Rowan & Blewitt out of the Eastern District of Virginia, the district in which Rowan & Blewitt's main office is located. By those subpoenas, Plaintiffs sought essentially everything in Rowan & Blewitt's files relating to the litigation support it

provided Goodyear and its attorneys, as well as deposition testimony of a witness pursuant to Federal Rule of Civil Procedure 30(b)(6).

Goodyear and Rowan & Blewitt sought to quash the subpoena because it seeks material Goodyear claims is protected under its attorney-client and work-product privileges. To do that, Goodyear commenced a miscellaneous action in the Eastern District of Virginia and moved to quash the subpoena. *Goodyear v. Payne*, No. 02-MC-51 (E.D. Va.).

The docket in that case indicates that the matter was assigned to District Judge Leonie Brinkema and that she assigned Goodyear's Motion to Quash to Magistrate Poretz. By Order dated November 15, 2002, Magistrate Poretz granted Goodyear's Motion to Quash and Motion for an Emergency Protective Order. (A. 8-9a.) The apparent basis for quashing the subpoena was that the deposition and document production was listed to take place outside the Eastern District of Virginia, the issuing Court. The homeowners never appealed, however, and the Protective Order remains in effect.

D. The Subpoena Issued in *Malek v. Goodyear*

On February 3, 2003, Plaintiffs in *Malek v. Goodyear* issued another subpoena out of the Eastern District of Virginia, this time with the deposition noticed to take place in McLean, VA. Plaintiffs sought exactly what was sought by the previous subpoenas and the document requests are identical.

Goodyear again filed a miscellaneous action and moved to quash the subpoena on the grounds that the material sought is privileged. *Goodyear v. Malek*, No. 03-MC-08 (E.D. Va.). Goodyear also argued that the subpoenaed materials are protected by the November 15 Protective Order issued in *Goodyear v. Payne* that was never appealed.

According to the docket, the Miscellaneous Action in *Goodyear v. Malek* was assigned directly to Magistrate Poretz by the clerk of court, as opposed to an Article III district judge. After the subpoenaed documents were submitted *in camera* with a privilege log and full briefing, Magistrate Poretz denied Goodyear's Motion by Order dated April 30, 2003, and compelled "Rowan & Blewitt to produce the requested documents and witness for deposition." (A. 7a.) On May 8, 2003—eight days later—Goodyear filed a Notice of Appeal in the District Court to the Fourth Circuit.

By Order dated August 6, the Court of Appeals dismissed Goodyear's appeal on the grounds that: (a) the April 30 Order involves a nondispositive matter; (b) such orders must first be appealed to the District Court within ten days; and (c) the April 30 Order was not first appealed to the District Court. (A. 2-3a.) The Fourth Circuit denied Goodyear's Petition for Rehearing or Rehearing *en Banc*. (A. 1a.)

E. Subject Matter Jurisdiction Below

Subject matter jurisdiction in *Malek v. Goodyear*, No. 02-B-1772 (D. Colo.), is based on diversity of citizenship. 28 U.S.C. § 1332(a)(1). The subpoena issued against Rowan & Blewitt was issued out of the Eastern District of Virginia. Goodyear filed a miscellaneous action and moved to quash the subpoena under that Court's ancillary jurisdiction. FED. R. CIV. P. 45(c)(3)(A).

REASONS FOR GRANTING THE WRIT

I. MAGISTRATE PORETZ LACKED JURISDICTION TO ENTER THE APRIL 30 ORDER

The Federal Magistrates Act, 28 U.S.C. § 631 *et seq.*, and Rules of Civil Procedure provide that magistrates can be referred matters in several ways, including: **(1)** nondispositive matters without the parties' consent, 28 U.S.C. § 636(b)(1)(A) & FED. R. CIV. P. 72(a); **(2)** dispositive

matters without the parties' consent, 28 U.S.C. § 636(b)(1)(B) & FED. R. CIV. P. 72(b); and **(3)** dispositive matters with the parties' consent, 28 U.S.C. § 636(c) & FED. R. CIV. P. 73. As explained below, each of these instances in which a magistrate obtains jurisdiction requires very specific things to occur and each implicates a different right of review.

As further explained, Magistrate Poretz never obtained jurisdiction to act in this matter and his April 30 Order is a legal nullity. As a result, the case should be remanded with direction that his April 30 Order be vacated. The Fourth Circuit's August 6 and September 23 Orders do not even address these procedural and jurisdictional defects. In fact, these defects are so patent and fundamental that this Court can and should vacate the Fourth Circuit's and District Court's rulings based on this Petition alone without the need for formal briefing.

A. Nondispositive Matters Without Consent: Section 636(b)(1)(A) and Rule 72(a)

For a magistrate to have jurisdiction over a nondispositive pretrial matter in a case, a number of things must occur, including: (a) the case—like every case filed in federal court—must initially be assigned to an Article III district judge[1]; and (b) the district judge must then "designate" a magistrate to hear a matter and "refer" the matter to him or her.[2] If those two things occur, an "appeal" of the ruling can be taken to the district judge to whom the case is assigned within ten days.[3]

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[1] U.S. CONST. Art. III, § 2; 28 U.S.C. § 132 (creation of the District Courts); 28 U.S.C. § 137 (designation and assignment of cases among district judges).

[2] 28 U.S.C. § 636(b)(1)(A) ("a judge may designate a magistrate . . . ."); FED. R. CIV. P. 72(a) ("A magistrate judge to whom a pretrial matter . . . is referred . . . .").

[3] 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(a) (a party can file

In its August 6 Order, the Fourth Circuit in this case indicates that it believes this appeal is procedurally defective because the April 30 Order is nondispositive and an appeal was not taken first to the District Court. (A. 2a.) The panel's finding is clearly erroneous. First, none of the things required to confer jurisdiction on Magistrate Poretz occurred and he acted *ultra vires*. Second, the April 30 Order is a "dispositive" order and resolved all issues presented in *Goodyear v. Malek*. And third, an appeal was in fact filed in the District Court within ten days of the April 30 Order, albeit to the Court of Appeals.

1. *The Case Was Never Assigned to a District Judge and Then Referred to Magistrate Poretz*

First, the miscellaneous action *Goodyear v. Malek* was never assigned to an Article III district judge. Instead, at the very top of the docket, the clerk of court notes that the case was "[a]ssigned to: Magistrate Judge Barry R. Poret [sic]." The fifth and thirteenth docket entries likewise indicate that no district judge was ever assigned: "NOTICE of Hearing: Motion Hearing Deadline before Judge Unassigned . . . . ."

According to the clerk's office, the reason the case was assigned directly to a magistrate and not a district judge is because it viewed the case as simply a discovery dispute and magistrates generally hear discovery matters. If this was in fact the case, it is mysterious why District Judge Brinkema was assigned to the miscellaneous action in *Goodyear v. Payne*—and then referred it to Magistrate Poretz as required by Article III, the Magistrates Act, and the Rules of Civil Procedure—given that it involved essentially identical papers.

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objections to a magistrate's ruling within ten days to "[t]he district judge to whom the case is assigned . . . .").

The assignment of the case directly to Magistrate Poretz renders his April 30 Order a nullity because the case was never assigned to a district judge and not then referred to a magistrate, both of which are required for a magistrate to take jurisdiction. In other words, the Constitution, the Federal Magistrates Act, and the Rules of Civil Procedure were all simply *bypassed*, rendering the April 30 Order by Magistrate Poretz a legal nullity.

Case law is directly on point. For example, in *Dixon v. Francis*, 2001 U.S. App. LEXIS 2774 (4th Cir. Feb. 26, 2001), a magistrate terminated a civil action and an appeal was taken to the Fourth Circuit. That Court reversed for lack of jurisdiction, but vacated the magistrate's dispositive ruling because she lacked jurisdiction as well: "In this case, we find nothing in the record showing that the parties agreed to have Dixon's complaint decided by the magistrate judge. As a result, the magistrate judge lacked authority to enter a final order terminating the case." *Id.* at **2.

The Ninth Circuit reached the same conclusion in *Reynaga v. Cammisa*, 971 F.2d 414 (9th Cir. 1992). In that case, plaintiff filed suit in the District Court and the case was—according to the docket—assigned to a district judge and referred to a magistrate. On appeal, the Ninth Circuit held that the magistrate's order was a legal nullity for certain reasons discussed below. The Court's observations as to the assignment to the magistrate, however, are directly applicable in this case:

> Although the district court's docket sheet indicates that Reynaga's action was "assigned" to Judge Shubb and "referred to" Magistrate Hollows, the record contains no order from the district judge authorizing the magistrate to exercise jurisdiction in that action. If no such order, specific or general, exists, the magistrate was not permitted to participate in *any* way in Reynaga's action.

971 F.2d at 415 n.1 (emphasis in original).

The Ninth Circuit's observation in *Reynaga* states the obvious—magistrates are not Article III district judges, they may not act in a case unless specifically assigned the authority to do so by a district judge, and any action they take without proper assignment is without legal effect.

In this case, Magistrate Poretz's jurisdiction is not even in question—unlike *Reynaga*, the docket in *Goodyear v. Malek* is abundantly clear that a district judge was never even assigned to the case and Goodyear's Motion to Quash was never "referred" to Magistrate Poretz. The April 30 Order must be vacated for lack of jurisdiction.

2. *Magistrate Poretz's April 30 Order Resolved a "Dispositive" Issue in This Case*

Even if this case had been assigned to a district judge and then referred to Magistrate Poretz, the April 30 Order does not involve a "nondispositive" issue. To the contrary, the sole issue presented in *Goodyear v. Malek* is whether the documents and testimony sought by the subpoena are privileged or otherwise discoverable. That issue was presented by Goodyear's Motion to Quash and once that issue was purportedly resolved by the April 30 Order, absolutely nothing remained to be decided in the case.

This was recognized by the clerk's office, which made the following entry in the docket on April 30: "Case closed (kjon)." And again at the end of the docket: "CLOSED." When a case is closed, nothing remains to be resolved and the final order causing the case to be closed can be nothing other than dispositive. *American Stock Exch. v. Mopex, Inc.*, 215 F.R.D. 87, 92 (S.D.N.Y. 2002) ("A ruling is 'dispositive' if it resolves substantive claims for relief rather than mere issues in the litigation.").

Again, case law is directly on point. In *NLRB v. Frazier*, 966 F.2d 812 (3d Cir. 1992), a magistrate (who unlike Magistrate Poretz was referred the matter) denied the NLRB's application to enforce a subpoena. On appeal to the District Court, the denial of the enforcement action was deemed a nondispositive motion and treated accordingly for purposes of appeal. The Third Circuit disagreed, holding that resolution of a discovery action collateral to an ancillary action is dispositive and final because it terminates all the issues presented:

> The proceeding to enforce an agency subpoena is like a motion to dismiss; once the court grants a motion to dismiss or compels compliance with a subpoena, the court disposes of the entire case before it. . . . [I]n a proceeding to enforce a subpoena, the case before the district court is over regardless of which way the court rules. Once the court grants or quashes the agency subpoena, it determines with finality the duties of the parties. The district court proceeding is admittedly collateral to the Board's pending administrative proceeding, but the question of whether or not to enforce the subpoena is the only matter before the court. The court's decision seals with finality the district court proceeding and is subject to appellate review.
>
> . . . The magistrate judge's decision was not a pretrial determination of a motion collateral to the main proceeding before the district court, but a final decision which disposed entirely of the Board's business before the court. The district court should have reviewed the magistrate judge's decision accordingly.

966 F.2d at 817-18. Other decisions are in accord and discovery orders in ancillary actions directing an entity not a party to the main action are deemed dispositive. *See, e.g., In re Oral Testimony of a Witness*, 182 F.R.D. 196, 201-02

(E.D. Va. 1998) (following *NLRB v. Frazier*, although noting that the Fourth Circuit has not addressed the issue).

3. *An Appeal Was Filed in the District Court Within Ten Days of the April 30 Order*

Even if this case had been assigned to a district judge, even if that district judge had referred Goodyear's Motion to Quash to Magistrate Poretz, and even if that Motion presented a nondispositive issue—none of which occurred—Goodyear filed a Notice of Appeal in the District Court within ten days of the April 30 Order. As a result, if this Court were to conclude that the appeal properly lies in the District Court, it should simply remand with direction that that court take jurisdiction. *See* 28 U.S.C. § 1631 (a case or appeal should be transferred from one court to another if there is a want of jurisdiction and if such transfer is in the interest of justice); *Willis v. Bank of Am.*, No. 98-15027, 1998 U.S. App. LEXIS 31478 (9th Cir. Dec. 11, 1998) (transferring a magistrate's ruling under Section 1631 to the district court to be vacated); *Batiste v. Catoe*, 2001 U.S. App. LEXIS 23425 (4th Cir. Oct. 30, 2001) (effectively the same); *cf.* FED. R. APP. P. 4(d) (notice of appeal filed in the court of appeals will be transferred to the district court clerk and deemed filed there).

Indeed, Goodyear took the most reasonable route of appeal available given the clerk's office's erroneous assignment directly to a magistrate. First, to whom would Goodyear have appealed the April 30 Order at the district court level given that no district judge had ever been assigned to the case? Second, given that Goodyear's Motion to Quash presented a dispositive issue, the proper recourse for the magistrate was to issue a report and recommendation, not a final order. 28 U.S.C. § 636(b)(1)(B); FED. R. CIV. P. 72(b). He did not issue a report and recommendation, but rather issued a final and dispositive order compelling production of certain materials, a violation of which could result in contempt sanctions.

To put Goodyear in a worse position, the April 30 Order does not compel Goodyear to produce documents it claims are privileged, but rather compels Rowan & Blewitt to produce such materials. If the April 30 Order compelled Goodyear to produce the documents, an argument can be made that it should bear the risk of being held in contempt for not complying with the Order, and then seek appellate review:

> The general rule [set forth in *Alexander v. United States*, 201 U.S. 117 (1906)] persists that appeal cannot be taken from an ancillary proceeding. It has been explained on grounds similar to those advanced in other discovery settings to justify insistence on the disobedience and contempt path of review. The hazards of contempt will encourage all parties to reconsider their positions, and with respect to oral depositions will flesh out the record by establishing the precise questions to be answered.

15B CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3914.24, at 174 (2d ed. 1992) (footnotes omitted).

But that is not the case when a third party is compelled to produce materials that infringe upon another's rights and privileges. In other words, it is unlikely Rowan & Blewitt will be nearly as willing to confront contempt proceedings to protect Goodyear's privileges.

Third, and as discussed below, the only avenue by which a magistrate can resolve a dispositive issue by order—as opposed to report and recommendation—is by consent of the parties under Section 636(c)(1) and Rule 73. The right of appeal from such an order is directly to a Court of Appeals under Section 636(c)(3) and Rule 73(c), which is precisely what Petitioner did in this case.

And while the parties never expressly consented to have Magistrate Poretz resolve anything in this case, this was

procedurally the "closest" to what occurred because: (a) Magistrate Poretz resolved the same issue in *Payne*; and (b) the parties agreed to have Goodyear's Motion to Quash in *Malek* listed for hearing on March 21, 2003, because the scheduling calendar put it before Magistrate Poretz. In other words, Goodyear took the most appropriate route of appeal because what occurred below is closest to: (a) a magistrate's decision on a dispositive issue; (b) by final order as opposed to a report and recommendation; and (c) with the parties' consent. 28 U.S.C. § 636(c) & FED. R. CIV. P. 73. Such an appeal lies directly in the Courts of Appeals and it was clearly erroneous for the Fourth Circuit to dismiss Goodyear's appeal.

Given how the clerk of court completely mishandled the assignment of this case, Goodyear has taken the best course of appellate review under the circumstances. The proper recourse at this stage is for this Court to remand with direction that the April 30 Order be vacated and direct the clerk of court to assign the case to a district judge as is Goodyear's right under the Constitution and the United States Code. Alternatively, if the Court believes that review lies first in the District Court, it should remand with direction that that court take the case given that Goodyear filed a notice of appeal within eight days of the magistrate's ruling.

B. Dispositive Matters Without Consent: Section 636(b)(1)(B) and Rule 72(b)

For a magistrate to have jurisdiction over a dispositive matter in a case without the parties' consent, a number of things must occur, including: (a) the case must be assigned to an Article III district judge, *supra* n.1; and (b) the district judge must then "designate" a magistrate to rule on a matter and "assign" the matter to it, 28 U.S.C. § 636(b)(1)(B); FED. R. CIV. P. 72(b). If those two things occur, the magistrate may issue a report and recommendation, to which the parties can submit challenges to the district judge assigned to

the case within ten days. 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b).

As explained above, this case was never assigned to a district judge and no district judge ever referred the case to Magistrate Poretz. As a result, he had no jurisdiction to issue the April 30 Order and it is a legal nullity.

In addition, Goodyear's Motion to Quash presents an issue dispositive of all the issues in this case. As a result, even if Magistrate Poretz had jurisdiction to address Goodyear's Motion to Quash, he only had jurisdiction to issue a report and recommendation, not a final order compelling production of privileged materials. Indeed, he has issued such reports in the past[4] and the reason he was unaware that Goodyear's Motion to Quash is dispositive may simply be that the Motion was not *referred* to him by an Article III district judge. As the Court held in *Reynaga*:

> Here, however, the magistrate did not recommend the imposition of a stay; rather, he *imposed* it himself. That order was beyond the magistrate's authority: it was beyond his jurisdiction and was, in essence, a legal nullity.

971 F.2d at 417 (emphasis in original).

Finally, even if this case had been assigned to a district judge, even if that district judge had referred Goodyear's Motion to Quash to Magistrate Poretz, and even if Judge Poretz had issued a report and recommendation instead of a final order, Goodyear filed a Notice of Appeal within ten

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[4] *See, e.g., Jack in the Box v. Jackinthebox.org*, No. 00-913-A, 2001 U.S. Dist. LEXIS 9583, at *17-18 (E.D. Va. Apr. 17, 2001) (Poretz, M.J.) ("The parties are advised that exceptions to this Report and Recommendation pursuant to 28 U.S.C. § 636 and Fed. R. Civ. P. 72(b) must be filed within ten (10) days after service."), *adopted*, 143 F. Supp. 2d 590 (E.D. Va. 2001).

days of the April 30 Order. If this Court were to conclude that the appeal properly lies in the District Court, it should simply order that the case be transferred to that Court pursuant to 28 U.S.C. § 1631.

C. Dispositive Matters with Consent: Section 636(c) and Rule 73

For a magistrate to have jurisdiction over a dispositive matter by the parties' consent, a number of things must occur, including: (a) the case must be assigned to an Article III district judge, *supra* n.1; (b) the district judge must then "specially designate" a magistrate to resolve an issue, 28 U.S.C. § 636(c)(1); FED. R. CIV. P. 73(a); and (c) the parties must specifically consent in writing, 28 U.S.C. § 636(c)(1); FED. R. CIV. P. 73(b). If those three things occur, a magistrate's ruling is directly appealable to the Court of Appeals for the Circuit within which he or she sits. 28 U.S.C. § 636(c)(3); FED. R. CIV. P. 73(c).

Again, Magistrate Poretz lacked jurisdiction to issue the April 30 Order because the case was never assigned to a district judge, he was never specially designated to rule on anything, and the parties never expressly consented to his deciding the case. And again, his ruling is a nullity. *Parks v. Collins*, 761 F.2d 1101, 1106 (5th Cir. 1985) (magistrate lacked authority to act under Section 636(c) because there was no "order of reference from the district judge" and no indication that the parties consented to have the magistrate decide the motion); *Henry v. Tri-Services*, 33 F.3d 931, 933 (8th Cir. 1994) (same); *Columbia Record Prods. v. Hot Wax Records*, 966 F.2d 515, 517 (9th Cir. 1992) (same).

Had those things occurred, however, the appeal in the Fourth Circuit was proper. And as also explained above, this is the "closest" to what occurred in this case because the April 30 Order addresses a dispositive issue and is not a

report and recommendation, something that can only take place under Section 636(c) and Rule 73.

II. THIS ISSUE IS IMPORTANT

"Communications between officers and employees of the same entity relayed to corporate counsel for the purpose of obtaining legal advice are entitled to the attorney-client privilege." *Virginia Elec. & Power Co. v. Westmoreland-LG&E Partners*, 526 S.E.2d 750, 755 (Va. 2000). As this Court has explained, the attorney-client privilege is the oldest and most revered of all the privileges:

> The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.

Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (citation omitted).

The attorney-client privilege is not limited to communications between the attorney and the client. To the contrary, communications between attorneys and their clients to and from independent contractors for the client—such as public relations/litigation management firms such as Rowan & Blewitt—are equally protected under the privilege. Case law is directly on point.

For example, in *In re Copper Market Antitrust Litigation*, 200 F.R.D. 213 (S.D.N.Y. 2001), the Court was presented with the same issue and concluded that such evidence was protected by the attorney-client privilege. In that case, a Japanese corporation was involved in antitrust litigation involving global copper pricing. The corporation hired a

public relations corporation to help "damage control, *i.e.*, the management of press statements in the context of anticipated litigation to ensure that they do not themselves further damage the client." *Id.* at 215-16 (internal quotations omitted). The public relations firm's role was to "help the Company make the statements it needed to make, but to do so within the necessary legal framework—all with the realization, indeed the expectation, that each such statement might subsequently be used by Sumitomo's adversaries in litigation." *Id.* at 216 (internal quotations omitted).

As in this case, Plaintiffs in *Copper Market* issued a subpoena for various documents developed by the public relations firm and the Japanese corporation moved to quash the subpoena, arguing that the documents were privileged under the attorney-client and work-product privileges. The Court agreed, finding that the public relations firm was part of the attorney-client communication link:

> RLM was, essentially, incorporated into Sumitomo's staff to perform a corporate function that was necessary in the context of the government investigation, actual and anticipated private litigation, and heavy press scrutiny obtaining at the time. Sumitomo retained RLM to deal with public relations problems following the exposure of the copper trading scandal. Sumitomo's internal resources were insufficient to cover the task. RLM's public relations duties included preparing statements for public release and internal documents designed to inform Sumitomo employees about what could and could not be said about the scandal. . . . In formulating communications on Sumitomo's behalf, RLM sought advice from Sumitomo's counsel and was privy to advice concerning the scandal and attendant litigation.
>
> * * * * *
>
> The Court therefore finds that, for purposes of the attorney-client privilege, RLM can fairly be equated

> with the Sumitomo for purposes of analyzing the availability of the attorney-client privilege to protect communications to which RLM was a party concerning its scandal-related duties. Accordingly, confidential communications between RLM and Sumitomo's counsel, or between RLM and Sumitomo, or among RLM, Sumitomo's in-house counsel and Paul Weiss that were made for the purpose of facilitating the rendition of legal services to Sumitomo can be protected from disclosure by the attorney-client privilege.

200 F.R.D. at 219 (citation omitted); *see also In re Grand Jury Subpoenas Dated March 24, 2003*, (S.D.N.Y. 2003).

If the Fourth Circuit's dismissal of the appeal in this case is allowed to stand, it will extinguish Petitioner's privileges forever because once privileged materials are disclosed, the privileges are gone:

> Undergirding those previous holdings is the notion that, once putatively protected material is disclosed, the very "right sought to be protected" has been destroyed. That is so because, as we noted previously, underlying the attorney-client privilege is the policy of encouraging full and frank communications between an attorney and client, without the fear of disclosure, so as to aid in the administration of justice. Concomitantly, the work product doctrine is designed to promote the adversarial process by maintaining the confidentiality of documents prepared by or for attorneys in anticipation of litigation. Appeal after final judgment cannot remedy the breach in confidentiality occasioned by erroneous disclosure of protected materials. At best, on appeal after final judgment, an appellate court could send the case back for re-trial without use of the protected materials. At that point, however, the cat is already out of the bag.

In re Ford Motor Co., 110 F.3d 954, 963 (3d Cir. 1997) (internal quotations omitted) *see also id.* ("Attorneys cannot unlearn what has been disclosed to them in discovery" and

"there is no way to unscramble the egg scrambled by disclosure . . . ."); *Fawcett v. McRobert*, 326 F.3d 491, 496 (4th Cir. 2003) (same).

Under this Court's Rule 10, a writ of certiorari should issue to resolve what appears to be a fundamental misunderstanding by district courts within the United States on an important issue of federal law—Article III of the Constitution and various provisions of the Judicial Code require that Article III district judges be assigned to cases when they are filed, as opposed assigning them directly to magistrates who have not gone through the nomination and confirmation process and allowing them to handle the case "soup to nuts." Petitioner has the right under Article III of the Constitution to have a district judge hear this matter and that right has been completely ignored.

CONCLUSION

For the reasons set forth above, The Goodyear Tire & Rubber Company respectfully requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[September 23, 2003]

No. 03-1622
MISC-03-8

GOODYEAR TIRE & RUBBER COMPANY, INCORPORATED
Plaintiff-Appellant

v.

FREDERIC V. MALEK
Defendant-Appellee

ROWAN & BLEWITT, INCORPORATED
Movant

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel comprised of Judge Widener, Judge Traxler, and Judge Hamilton.

For the Court,

/s/ Patricia S. Connor
CLERK

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[August 6, 2003]

No. 03-1622
MISC-03-8

GOODYEAR TIRE & RUBBER COMPANY, INCORPORATED,
Plaintiff-Appellant,

versus

FREDERIC V. MALEK,
Defendant-Appellee,

ROWAN & BLEWITT, INCORPORATED,
Movant.

ORDER

Defendant/Appellee Frederick V. Malek moves to dismiss Appellant Goodyear Tire & Rubber Company's ("Goodyear") appeal from the magistrate judge's order denying Goodyear's motion to quash a subpoena issued in the United States District Court for the Eastern District of Virginia pertaining to an action pending in federal district court in Colorado. Under Rule 72(a) of the Federal Rules of Civil Procedure, a party has ten days to file objections to the magistrate judge's pretrial order concerning a nondispositive matter. "[A] party may not thereafter assign as error a defect in the magistrate judge's order to which objection was not timely made." Fed. R. Civ. P. 72(a). It is undisputed that Goodyear failed to file objections in the district court concerning, or appeal to the district court from, the magistrate judge's order. Accordingly,

Goodyear waived its right to challenge the magistrate judge's order on appeal. *Id.*

Accordingly, we grant Malek's motion to dismiss the appeal.

Entered at the direction of Judge Widener with the concurrence of Judge Traxler and Senior Judge Hamilton.

For the Court,

/s/ Patricia S. Connor
CLERK

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

[May 29, 2003]

Civil Action No. 03-MC-8

THE GOODYEAR TIRE & RUBBER CO.,
Plaintiff,

v.

FREDERIC V. MALEK,
Defendant.

ORDER

Before the Court, without the necessity of oral argument, are the following motions 1) Plaintiff, Goodyear Tire & Rubber Co's Motion to Have the Documents Submitted *In Camera* Remain Under Seal and to Stay the Deposition of Rowan & Blewitt Pending Defendant's Appeal, 2) Defendants', "Homeowners" Motion to Strike Goodyear's Motion Filed May 23, 2003 and in the Alternative, Defendants' Supplemental Response.

Upon consideration of all the submissions, it is

ORDERED,

Plaintiff's Motion to Have the Documents Submitted *In Camera* Remain Under Seal and to Stay the Deposition of Rowan & Blewitt Pending Defendant's Appeal is GRANTED, and Defendants' Motion to Strike Goodyear's Motion filed May 23, 2003 is DENIED.

The Court has granted this stay for two reasons. First, the trial of this matter is apparently scheduled for April, 2004 in the Federal District Court in Colorado. This Court finds that the Homeowners will not suffer substantial harm by what may be, for the reason explained below, a very brief stay of the April 30, 2003 order of this Court.

Secondly, Goodyear has not addressed the issue of a direct appeal of a nondispositive motion to the Court of Appeals. The Homeowners raise the issue to the extent of arguing that the Fourth Circuit is among the majority of the courts of appeal that decline to exercise jurisdiction under the collateral order doctrine from discovery orders.

Both parties fail to note that a party may not appeal directly to the Court of Appeals from a magistrate judges non-dispositive pretrial order. *See, e.g., Simpson v. Lear Astronics Corp.*, 77 F.3d 1170, 1173-74 (9th Cir. 1996) (if party does not object to district court, and if district court does not therefore hear the issue, finding of magistrate judge under Rule 72(a) cannot be appealed to circuit court).

While this Court believes the appeal to the Fourth Circuit is thus procedurally defective and that the stay granted herein will thereby be necessarily short lived, the magistrate judge respectfully defers to the Court of Appeals to rule on this jurisdictional issue.

For the reasons set forth herein the Order of April 30, 2003 is STAYED until further order of this court.

Entered this 29th day of May, 2003.

/s/ Barry R. Poretz
Barry R. Poretz
United States Magistrate Judge

Alexandria, Virginia

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

[April 30, 2003]

Civil Action No. 03-MC-8

THE GOODYEAR TIRE & RUBBER CO.,
Plaintiff,

v.

FREDERIC V. MALEK,
Defendant.

ORDER

Before the Court is the Motion of Goodyear Tire & Rubber Company to Quash the Subpoena of Rowan & Blewitt, Inc., the Opposition of the Malek Homeowners thereto, and Goodyear's Reply to the Opposition.

Having taken this matter under advisement, the Court has received Goodyear's Privilege Log, and the Malek Homeowner's Objections thereto. The Court has additionally carefully reviewed the documents submitted for *in camera* review as referenced in the privilege log.

Upon a review of all the submissions and for the reasons set forth in the Malek Oppositions, which the Court adopts as it's own, it is

ORDERED,

Defendant's Motion to Quash the Subpoena of Rowan & Blewitt, Inc. is DENIED. The Court specifically and fully

sustains the objections of the Malek Homeowners to Goodyear's privilege log and requires Rowan & Blewitt to produce the requested documents and witness for deposition.

It is further ORDERED,

The Motion for Joinder of Rowan & Blewitt, Inc. is GRANTED.

As this is a miscellaneous action filed in this Court, and is a proceeding ancillary to the lawsuit filed in the United States District Court for the District of Colorado, the Clerk of this Court is DIRECTED to place UNDER SEAL the documents submitted for *in camera* review until further order of this Court.

Entered this 30th day of April, 2003.

/s/ Barry R. Poretz
Barry R. Poretz
United States Magistrate Judge

Alexandria, Virginia

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

[Nov. 15, 2002]

Civil Action No. 02-MC-51

STEPHEN PAYNE, *et al.*,
Plaintiffs,

v.

GOODYEAR TIRE & RUBBER CO.,
Defendant.

ORDER

Before the Court, having been taken under advisement, are Defendant's Motion for an Emergency Protective Order and Defendant's Motion to Quash the Subpoenas of David Bartlett and Rowan & Blewitt, Inc. At the motions hearing on October 11, 2002, the Court ordered the parties to submit briefs in support of their respective positions. The Court has received and reviewed the parties' briefs, and adopts Defendant's argument in favor of quashing the above Subpoenas. For the reasons set forth in Defendant's Brief, it is hereby

ORDERED,

Defendant's Motion to Quash the Subpoenas of David Bartlett and Rowan & Blewitt is GRANTED, and necessarily,

Defendant's Motion for an Emergency Protective Order is likewise GRANTED:

/s/ Barry R. Poretz
Barry R. Poretz
United States Magistrate Judge

November 15, 2002
Alexandria, Virginia

APPENDIX F

CONSTITUTION OF THE
UNITED STATES OF AMERICA

ARTICLE III. JUDICIAL POWER

Section 1.

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

CONSTITUTION OF THE UNITED STATES OF AMERICA

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CODE

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART I. ORGANIZATION OF COURTS
CHAPTER 5. DISTRICT COURTS

§ 132. Creation and composition of district courts

(a) There shall be in each judicial district a district court which shall be a court of record known as the United States District Court for the district.

(b) Each district court shall consist of the district judge or judges for the district in regular active service. Justices or judges designated or assigned shall be competent to sit as judges of the court.

(c) Except as otherwise provided by law, or rule or order of court, the judicial power of a district court with respect to any action, suit or proceeding may be exercised by a single judge, who may preside alone and hold a regular or special session of court at the same time other sessions are held by other judges.

June 25, 1948, ch 646, § 1, 62 Stat. 895; Nov. 13, 1963, P.L. 88-176, § 2, 77 Stat. 331.

* * * * *

§ 137. Division of business among district judges

The business of a court having more than one judge shall be divided among the judges as provided by the rules and orders of the court.

The chief judge of the district court shall be responsible for the observance of such rules and orders, and shall divide the business and assign the cases so far as such rules and orders do not otherwise prescribe.

If the district judges in any district are unable to agree upon the adoption of rules or orders for that purpose the judicial council of the circuit shall make the necessary orders.

June 25, 1948, ch 646, § 1, 62 Stat. 897.

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART III. COURT OFFICERS AND EMPLOYEES
CHAPTER 43. UNITED STATES MAGISTRATES

§ 636. Jurisdiction, powers, and temporary assignment

(a) Each United States magistrate serving under this chapter shall have within the territorial jurisdiction prescribed by his appointment—

(1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts;

(2) the power to administer oaths and affirmations, issue orders pursuant to section 3142 of title 18 concerning release or detention of persons pending trial, and take acknowledgments, affidavits, and depositions;

(3) the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section;

(4) the power to enter a sentence for a petty offense; and

(5) the power to enter a sentence for a class A misdemeanor in a case in which the parties have consented.

(b)(1) Notwithstanding any provision of law to the contrary—

(A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon

which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's [magistrate judge's] order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

(2) A judge may designate a magistrate to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts. A judge may designate a magistrate to serve as a special master in any civil case,

upon consent of the parties, without regard to the provisions of rule 53(b) of the Federal Rules of Civil Procedure for the United States district courts.

(3) A magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.

(4) Each district court shall establish rules pursuant to which the magistrates [magistrate judge's] shall discharge their duties.

(c) Notwithstanding any provision of law to the contrary —

(1) Upon the consent of the parties, a full-time United States magistrate or a part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. Upon the consent of the parties, pursuant to their specific written request, any other part-time magistrate may exercise such jurisdiction, if such magistrate meets the bar membership requirements set forth in section 631(b)(1) and the chief judge of the district court certifies that a full-time magistrate is not reasonably available in accordance with guidelines established by the judicial council of the circuit. When there is more than one judge of a district court, designation under this paragraph shall be by the concurrence of a majority of all the judges of such district court, and when there is no such concurrence, then by the chief judge.

(2) If a magistrate is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, notify the parties of the availability of a magistrate to exercise such

jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, either the district court judge or the magistrate may again advise the parties of the availability of the magistrate, but in so doing, shall also advise the parties that they are free to withhold consent without adverse substantive consequences. Rules of court for the reference of civil matters to magistrates [magistrate judges] shall include procedures to protect the voluntariness of the parties' consent.

(3) Upon entry of judgment in any case referred under paragraph (1) of this subsection, an aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate in the same manner as an appeal from any other judgment of a district court. The consent of the parties allows a magistrate designated to exercise civil jurisdiction under paragraph (1) of this subsection to direct the entry of a judgment of the district court in accordance with the Federal Rules of Civil Procedure. Nothing in this paragraph shall be construed as a limitation of any party's right to seek review by the Supreme Court of the United States.

(4) The court may, for good cause shown on its own motion, or under extraordinary circumstances shown by any party, vacate a reference of a civil matter to a magistrate under this subsection.

(5) The magistrate shall, subject to guidelines of the Judicial Conference, determine whether the record taken pursuant to this section shall be taken by electronic sound recording, by a court reporter, or by other means.

(d) The practice and procedure for the trial of cases before officers serving under this chapter shall conform to rules promulgated by the Supreme Court pursuant to section 2072 of this title.

(e) *Contempt authority.*

(1) *In general.* United States magistrate judge serving under this chapter shall have within the territorial jurisdiction prescribed by the appointment of such magistrate judge the power to exercise contempt authority as set forth in this subsection.

(2) *Summary criminal contempt authority.* A magistrate judge shall have the power to punish summarily by fine or imprisonment, or both, such contempt of the authority of such magistrate judge constituting misbehavior of any person in the magistrate judge's presence so as to obstruct the administration of justice. The order of contempt shall be issued under the Federal Rules of Criminal Procedure.

(3) *Additional criminal contempt authority in civil consent and misdemeanor cases.* In any case in which a United States magistrate judge presides with the consent of the parties under subsection (c) of this section, and in any misdemeanor case proceeding before a magistrate judge under section 3401 of title 18, the magistrate judge shall have the power to punish, by fine or imprisonment, or both, criminal contempt constituting disobedience or resistance to the magistrate judge's lawful writ, process, order, rule, decree, or command. Disposition of such contempt shall be conducted upon notice and hearing under the Federal Rules of Criminal Procedure.

(4) *Civil contempt authority in civil consent and misdemeanor cases.* In any case in which a United States magistrate judge presides with the consent of the parties under subsection (c) of this section, and in any misdemeanor case proceeding before a magistrate judge under section 3401 of title 18, the magistrate judge may exercise the civil contempt authority of the district court. This paragraph shall not be construed to limit the author-

ity of a magistrate judge to order sanctions under any other statute, the Federal Rules of Civil Procedure, or the Federal Rules of Criminal Procedure.

(5) *Criminal contempt penalties.* The sentence imposed by a magistrate judge for any criminal contempt provided for in paragraphs (2) and (3) shall not exceed the penalties for a Class C misdemeanor as set forth in sections 3581(b)(8) and 3571(b)(6) of title 18.

(6) *Certification of other contempts to the district court.* Upon the commission of any such act—

(A) in any case in which a United States magistrate judge presides with the consent of the parties under subsection (c) of this section, or in any misdemeanor case proceeding before a magistrate judge under section 3401 of title 18, that may, in the opinion of the magistrate judge, constitute a serious criminal contempt punishable by penalties exceeding those set forth in paragraph (5) of this subsection, or

(B) in any other case or proceeding under subsection (a) or (b) of this section, or any other statute, where—

(i) the act committed in the magistrate judge's presence may, in the opinion of the magistrate judge, constitute a serious criminal contempt punishable by penalties exceeding those set forth in paragraph (5) of this subsection,

(ii) the act that constitutes a criminal contempt occurs outside the presence of the magistrate judge, or

(iii) the act constitutes a civil contempt, the magistrate judge shall forthwith certify the facts to a district judge and may serve or cause to be served, upon any person whose behavior is brought into

question under this paragraph, an order requiring such person to appear before a district judge upon a day certain to show cause why that person should not be adjudged in contempt by reason of the facts so certified. The district judge shall thereupon hear the evidence as to the act or conduct complained of and, if it is such as to warrant punishment, punish such person in the same manner and to the same extent as for a contempt committed before a dis trict judge.

(7) *Appeals of magistrate judge contempt orders.* The appeal of an order of contempt under this subsection shall be made to the court of appeals in cases proceeding under subsection (c) of this section. The appeal of any other order of contempt issued under this section shall be made to the district court.

(f) In an emergency and upon the concurrence of the chief judges of the districts involved, a United States magistrate may be temporarily assigned to perform any of the duties specified in subsection (a), (b), or (c) of this section in a judicial district other than the judicial district for which he has been appointed. No magistrate shall perform any of such duties in a district to which he has been temporarily assigned until an order has been issued by the chief judge of such district specifying (1) the emergency by reason of which he has been transferred, (2) the duration of his assignment, and (3) the duties which he is authorized to perform. A magistrate so assigned shall not be entitled to additional compensation but shall be reimbursed for actual and necessary expenses incurred in the performance of his duties in accordance with section 635.

(g) A United States magistrate may perform the verification function required by section 4107 of title 18, United States Code. A magistrate may be assigned by a judge of any United States district court to perform the verification re-

quired by section 4108 and the appointment of counsel authorized by section 4109 of title 18, United States Code, and may perform such functions beyond the territorial limits of the United States. A magistrate assigned such functions shall have no authority to perform any other function within the territory of a foreign country.

(h) A United States magistrate who has retired may, upon the consent of the chief judge of the district involved, be recalled to serve as a magistrate in any judicial district by the judicial council of the circuit within which such district is located. Upon recall, a magistrate may receive a salary for such service in accordance with regulations promulgated by the Judicial Conference, subject to the restrictions on the payment of an annuity set forth in section 377 of this title or in subchapter III of chapter 83, and chapter 84, of title 5 which are applicable to such magistrate. The requirements set forth in subsections (a), (b)(3), and (d) of section 631, and paragraph (1) of subsection (b) of such section to the extent such paragraph requires membership of the bar of the location in which an individual is to serve as a magistrate , shall not apply to the recall of a retired magistrate under this subsection or section 375 of this title. Any other requirement set forth in section 631(b) shall apply to the recall of a retired magistrate under this subsection or section 375 of this title unless such retired magistrate met such requirement upon appointment or reappointment as a magistrate under section 631.

June 25, 1948, ch 646, § 1, 62 Stat. 917; Oct. 17, 1968, P.L. 90-578, Title I, § 101, 82 Stat. 1112; March 1, 1972, P.L. 92-239, §§ 1, 2, 86 Stat. 47; Oct. 21, 1976, P.L. 94-577, § 1, 90 Stat. 2729; Oct. 28, 1977, P.L. 95-144, § 2, 91 Stat. 1220; Oct. 10, 1979, P.L. 96-82, § 2, 93 Stat. 643; Oct. 12, 1984, P.L. 98-473, Title II, Ch I, § 208, 98 Stat. 1986; Nov. 8, 1984, P.L. 98-620, Title IV, Subtitle A, § 402(29)(B), 98 Stat. 3359; Nov. 14, 1986, P.L. 99-651, Title II, § 201(a)(2), 100 Stat.

3647; Nov. 15, 1988, P.L. 100-659, § 4(c), 102 Stat. 3918; Nov. 18, 1988, P.L. 100-690, Title VII, Subtitle H, § 7322, 102 Stat. 4467; Nov. 19, 1988, P.L. 100-702, Title IV, § 404(b)(1), Title X, § 1014, 102 Stat. 4651, 4669 Dec. 1, 1990, P.L. 101-650, Title III, § 308(a), 104 Stat. 5112; Oct. 19, 1996, P.L. 104-317, Title II, §§ 201, 202(b), 207, 110 Stat. 3848, 3849, 3850; Nov. 13, 2000, P.L. 106-518, §§ 202, 203(b), 114 Stat. 2412, 2414; Nov. 2, 2002, P.L. 107-273, Div. B, Title III, § 3002(b), 116 Stat. 1805.

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART IV. JURISDICTION AND VENUE
CHAPTER 99. GENERAL PROVISIONS

§ 1631. Transfer to cure want of jurisdiction

Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.

Added April 2, 1982, P.L. 97-164, Title III, Part A, § 301(a), 96 Stat. 55.

FEDERAL RULES OF CIVIL PROCEDURE

IX. SPECIAL PROCEEDINGS

Rule 72. Magistrate Judges; Pretrial Orders

(a) *Nondispositive Matters.* A magistrate judge to whom a pretrial matter not dispositive of a claim or defense of a party is referred to hear and determine shall promptly conduct such proceedings as are required and when appropriate enter into the record a written order setting forth the disposition of the matter. Within 10 days after being served with a copy of the magistrate judge's order, a party may serve and file objections to the order; a party may not thereafter assign as error a defect in the magistrate judge's order to which objection was not timely made. The district judge to whom the case is assigned shall consider such objections and shall modify or set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to law.

(b) *Dispositive Motions and Prisoner Petitions.* A magistrate judge assigned without consent of the parties to hear a pretrial matter dispositive of a claim or defense of a party or a prisoner petition challenging the conditions of confinement shall promptly conduct such proceedings as are required. A record shall be made of all evidentiary proceedings before the magistrate judge, and a record may be made of such other proceedings as the magistrate judge deems necessary. The magistrate judge shall enter into the record a recommendation for disposition of the matter, including proposed findings of fact when appropriate. The clerk shall forthwith mail copies to all parties.

A party objecting to the recommended disposition of the matter shall promptly arrange for the transcription of the record, or portions of it as all parties may agree upon or the magistrate judge deems sufficient, unless the district judge otherwise directs. Within 10 days after being served with a copy of the recommended disposition, a party may serve and

file specific, written objections to the proposed findings and recommendations. A party may respond to another party's objections within 10 days after being served with a copy thereof. The district judge to whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.

Added Apr. 28, 1983, eff. Aug. 1, 1983; amended Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993.
FEDERAL RULES OF CIVIL PROCEDURE

Rule 73. Magistrate Judges; Trial by Consent and Appeal

(a) *Powers; Procedure.* When specially designated to exercise such jurisdiction by local rule or order of the district court and when all parties consent thereto, a magistrate judge may exercise the authority provided by Title 28, U.S.C. § 636(c) and may conduct any or all proceedings, including a jury or nonjury trial, in a civil case. A record of the proceedings shall be made in accordance with the requirements of Title 28, U.S.C. § 636(c)(5).

(b) *Consent.* When a magistrate judge has been designated to exercise civil trial jurisdiction, the clerk shall give written notice to the parties of their opportunity to consent to the exercise by a magistrate judge of civil jurisdiction over the case, as authorized by Title 28, U.S.C. § 636(c). If, within the period specified by local rule, the parties agree to a magistrate judge's exercise of such authority, they shall execute and file a joint form of consent or separate forms of consent setting forth such election.

A district judge, magistrate judge, or other court official may again advise the parties of the availability of the magistrate

judge, but, in so doing, shall also advise the parties that they are free to withhold consent without adverse substantive consequences. A district judge or magistrate judge shall not be informed of a party's response to the clerk's notification, unless all parties have consented to the referral of the matter to a magistrate judge.

The district judge, for good cause shown on the judge's own initiative, or under extraordinary circumstances shown by a party, may vacate a reference of a civil matter to a magistrate judge under this subdivision.

(c) Appeal. In accordance with Title 28, U.S.C. §636(c)(3), appeal from a judgment entered upon direction of a magistrate judge in proceedings under this rule will lie to the court of appeals as it would from a judgment of the district court.

(d) [Abrogated]

Added Apr. 28, 1983, eff. Aug. 1, 1983; amended Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 11, 1997, eff. Dec. 1, 1997.

Supreme Court, U.S.
FILED
DEC 19 2003
OFFICE OF THE CLERK

No. 03-695

IN THE

Supreme Court of the United States

THE GOODYEAR TIRE & RUBBER COMPANY,
Petitioner,

v.

FREDERIC V. MALEK,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE FOURTH CIRCUIT COURT OF APPEALS

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

1. Pursuant to Federal Rule of Civil Procedure 83(a) and the Federal Magistrates Act, Local Rule 72 of the Eastern District of Virginia District Court authorizes and specifically designates magistrate judges to perform all duties authorized by the Federal Magistrates Act. Is Local Rule 72 valid?

PARTIES TO THE PROCEEDINGS

Pursuant to Supreme Court Rule 29.6, Respondent Frederick V. Malek states that he is an individual, not a corporation. Therefore, Rule 29.6 is inapplicable.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

STATUTES AND RULES INVOLVED 1

STATEMENT OF THE CASE 2

ARGUMENT 4

I. THE FOURTH CIRCUIT'S RULING IS NOT IN CONFLICT WITH ITS OTHER DECISIONS OR DECISIONS FROM OTHER CIRCUITS. 4

A. Local Rule 72 Conferred Jurisdiction on the Magistrate Judge. 5

B. Goodyear's Position Invites Chaos and Confusion in Courts Across the Country. 6

C. The April 30 Order was Nondispositive, and Goodyear Failed to File Written Objections in the District Court. 9

II. GOODYEAR'S INSERTION OF ITS ARGUMENT ON THE MERITS OF THE APRIL 30 ORDER DOES NOT ALTER THE PROCEDURAL NATURE OF THIS CASE, CORRECTLY DECIDED BY THE FOURTH CIRCUIT. 11

CONCLUSION 13

APPENDIX A-1

TABLE OF AUTHORITIES

FEDERAL CASES

A-Mark Auction Galleries, Inc. v. Am. Numismatic Assoc., 233 F.3d 895 (5th Cir. 2000) 12

Am. Stock Exch. v. Mopex, Inc., 215 F.R.D. 87 (S.D.N.Y. 2002) 9

Bhan v. NME Hosps., Inc., 929 F.2d 1404 (9th Cir. 1991) 7

Boughton v. Cotter Corp., 10 F.3d 746 (10th Cir. 1993) 11, 12

Dixon v. Francis, 2001 U.S. App. LEXIS 2774 (4th Cir. 2001) 9

E.I. DuPont de Nemours & Co. v. United States, 15 F. Supp. 2d 859 (Ct. Int'l Trade 1998) 10

Gomez v. United States, 490 U.S. 858 (1989) 8

In re Charlotte Observer, 882 F.2d 850 (4th Cir. 1989) 7

Mathews v. Weber, 423 U.S. 261 (1976) 7

MDK, Inc. v. Mike's Train House, Inc., 27 F.3d 116 (4th Cir. 1994) 9, 11

NLRB v. Frazier, 966 F.2d 812 (3d Cir. 1992) 9

Reynaga v. Cammisa, 971 F.2d 414 (9th Cir. 1992) 8

Simmons v. City of Racine, 37 F.3d 325 (7th Cir. 1994) 12

Strawbridge v. Sugar Mountain Resort, Inc., 243 F. Supp. 2d 472 (W.D.N.C. 2003) 7

Thomas v. Arn, 474 U.S. 140 (1985) 10

Thomas E. Hoar, Inc. v. Sara Lee Corp., 900 F.2d 522 (2d Cir. 1990) 9

United States v. Auberg, 2001 WL 987802 (S.D. Ind. July 9, 2001) 6

Wells v. Shriners Hosp., 109 F.3d 198 (4th Cir. 1997) 10

Wingerter v. Chester Quarry Co., 185 F.3d 657 (7th Cir. 1998) 7

DOCKETED CASES

Malek, et. al. v. Goodyear Tire & Rubber Co., No. 02-B-1772 (D. Colo.) 2

CONSTITUTIONAL PROVISIONS, STATUTES & RULES

U.S. CONST. art. III 2

28 U.S.C. § 636 ..... 2, 4, 5, 6, 8, 10

28 U.S.C. § 1291 12

Fed. R. Civ. P. 72 ..... 2, 3, 4, 5, 7, 8, 9, 10, 11

Fed. R. Civ. P. 83(a) 1, 5, 6,

Eastern District of Virginia
Local Rule 72 ..... 2, 3, 4, 5, 6, 8, 10

Eastern District of Oklahoma
Local Rule 72.1 7

Northern District of Ohio
Local Rule 72.2 7

Eastern District of North Carolina
Local Rule 72.2 7

Northern District of Indiana
Local Rule 72.1 7

Middle District of Alabama
Local Rule 72.2 7

Southern District of California
Local Rule 72.2 7

Western District of Texas
Local Rule 72 7

Southern District of Illinois
Local Rule 72.1 7

OPINIONS BELOW

Respondent accepts Petitioner's statements regarding the opinions below. Respondent adds that after the Fourth Circuit dismissed the Petitioner's appeal by Order entered August 6, 2003 (Pet. App. 2a-3a), the Magistrate Judge granted Respondent's Motion to Lift the Stay by Order entered on November 21, 2003. (App. A-1).

STATUTES AND RULES INVOLVED

Federal Rule of Civil Procedure 83(a), states as follows:

> (1) Each district court, acting by a majority of its district judges, may, after giving appropriate public notice and an opportunity for comment, make and amend rules governing its practice. A local rule shall be consistent with—but not duplicative of—Acts of Congress and rules adopted under 28 U.S.C. §§ 2072 and 2075, and shall conform to any uniform numbering system prescribed by the Judicial Conference of the United States. A local rule takes effect on the date specified by the district court and remains in effect unless amended by the court or abrogated by the judicial council of the circuit. Copies of rules and amendments shall, upon their promulgation, be furnished to the judicial council and the Administrative Office of the United States Courts and be made available to the public.

Eastern District of Virginia Local Rule 72, states as follows:

> Magistrate Judges of this District serve as judicial officers of the Court and are authorized and specially designated to perform all duties authorized or allowed to be performed by United States magistrate judges by the United States Code and any rule governing proceedings in this Court.
>
> Duties and cases may be assigned or referred to a Magistrate Judge by an Order entered in the action or on the instructions of a District Judge.

Article III of the United States Constitution, Title 28 of the United States Code Section 636, and Federal Rule of Civil Procedure 72 are reproduced in Petitioner's Appendix.

STATEMENT OF THE CASE

This action is ancillary to the main litigation pending in the United States District Court for the District of Colorado entitled *Malek, et. al. v. Goodyear Tire & Rubber Co.*, No. 02-B-1772 (D. Colo.). In the main litigation, Malek is one of 40 plaintiffs (the "Malek Homeowners") seeking damages arising from the installation of Goodyear's defective Entran II hose in 26 different properties. In February of 2003, respondent Frederick V. Malek ("Malek") issued a subpoena in the United States District Court for the Eastern District of Virginia to petitioner The Goodyear Tire & Rubber Company ("Goodyear") seeking discovery of documents and other materials from Rowan & Blewitt, a public relations firm Goodyear hired in connection with the Colorado litigation. Goodyear filed this miscellaneous action in the Eastern District of Virginia and sought to quash the subpoena.

Pursuant to Local Rule 72, the matter was assigned to a magistrate judge. By Order dated April 30, 2003, the Magistrate Judge rejected Goodyear's claims that the subpoenaed documents and materials were privileged, and held that the Malek Homeowners were entitled to obtain the subpoenaed documents and to take a deposition from a Rowan & Blewitt representative (the "April 30 Order"). (Pet. App. 6a-7a).

Subsequently, Goodyear failed to comply with Federal Rule of Civil Procedure 72(a), which requires that objections to a magistrate judge's order be filed in the district court ("Federal Rule 72"). Instead, Goodyear appealed directly to the Fourth Circuit, and asked the Magistrate Judge to stay the April 30 Order pending appeal. By Order entered on May 29, 2003, the Magistrate Judge granted the stay, reasoning that the Malek Homeowners would not suffer substantial harm because the stay would be brief. (Pet. App. 4a-5a). The Magistrate Judge predicted that because a party may not appeal directly to the Court of Appeals from a magistrate judge's nondispositive pretrial order, Goodyear's appeal would be summarily dismissed.

The Magistrate Judge was right. The Fourth Circuit dismissed Goodyear's appeal by Order dated August 6, 2003, and held that Goodyear waived its right to appeal the nondispositive pretrial Order by not first filing its objections with the district court. (Pet. App. 2a-3a). The Fourth Circuit quoted Federal Rule 72(a): "[A] party may not thereafter assign as error a defect in the magistrate judge's order to which objection was not timely made." (Pet. App. 2a). Goodyear first raised its jurisdictional challenges to the Magistrate Judge's authority in the Fourth Circuit. The Fourth Circuit again rejected the arguments in denying Goodyear's Motion for Rehearing or Rehearing En Banc; wherein no member of the court requested a poll on the petition for rehearing en banc. (Pet. App. 1a). Goodyear now raises its arguments before this Court.

After the Fourth Circuit dismissed the case, the Malek Homeowners moved to lift the stay placed on the subpoenaed documents. Goodyear opposed the stay with the same jurisdictional arguments it sets forth here. The Magistrate Judge rejected those arguments and lifted the stay by Order dated November 21, 2003. (App. A-1). This time, Goodyear filed its objections to the November 21 Order in the District Court pursuant to Federal Rule 72. Chief Judge Hilton vacated the hearing, and the parties are currently waiting for an Order.

In sum, Goodyear has lost at every turn with its "lack of jurisdiction" argument. The arguments have been rejected by the Magistrate Judge, and the entire Fourth Circuit. But Goodyear still asks this Court to decide in its favor and against local rules across the country by ruling that magistrate judges cannot perform the duties prescribed in the United States Code after the grant of authority by local rule.

ARGUMENT

Goodyear's entire appeal is controlled by Eastern District of Virginia Local Rule 72, which Goodyear failed to cite in its Petition. Local Rule 72 contains the grant of jurisdiction that Goodyear claims is missing here. Other district courts across the country have enacted similar local rules pursuant to the Federal Magistrates Act, and such rules are vital to the efficient functioning and effective case management of the district courts.

I. THE FOURTH CIRCUIT'S RULING IS NOT IN CONFLICT WITH ITS OTHER DECISIONS OR DECISIONS FROM OTHER CIRCUITS.

Goodyear asserts that the Fourth Circuit's decision is in direct conflict with one other Fourth Circuit decision and a Ninth Circuit decision because the Magistrate Judge had no jurisdiction to enter the discovery order at issue. Goodyear alleges that based on these other decisions, the Fourth Circuit should have held that the Magistrate Judge never had

jurisdiction, that the April 30 Order was a dispositive Order, and therefore, the proper recourse was to use its discretion and deem the appeal filed in the Fourth Circuit as filed in the District Court. *See* Pet. at 3. Goodyear thereby attempts to avoid the effect of its failure to file written objections in the district court pursuant to Federal Rule 72 by now claiming that the Magistrate Judge lacked jurisdiction to issue the April 30 Order.

Consistent with its previous decisions, and decisions from other courts, the Fourth Circuit recognized that Eastern District of Virginia Local Rule 72 conferred jurisdiction on the Magistrate Judge. Therefore, it rejected Goodyear's jurisdictional arguments and refused to allow Goodyear to avoid its mistake of not filing written objections to the Magistrate Judge's April 30 Order pursuant to Federal Rule 72.

Because Goodyear is asking this Court to hold that the Magistrate Judge did not have the authority to enter an Order on a nondispositive pretrial matter, even though Local Rule 72 expressly confers jurisdiction pursuant to 28 U.S.C. § 636, Goodyear is really asking this Court to hold that Local Rule 72 is an invalid grant of authority. Courts across the nation have enacted similar local rules that confer jurisdiction upon magistrate judges to decide pretrial matters, like the discovery issue here, pursuant to 28 U.S.C. § 636 and Federal Rule of Civil Procedure 83(a). Because Goodyear fails to acknowledge this local rule practice, and fails to make any showing that such local rules are invalid under any theory, the Petition should be denied.

A. Local Rule 72 Conferred Jurisdiction on the Magistrate Judge.

Goodyear concedes that under 28 U.S.C. § 636, magistrate judges may rule on nondispositive matters without consent if the magistrate is "designate[d]" to hear the matter. 28 U.S.C. § 636(b)(1)(A). Goodyear errs, however, in

asserting that a specific district judge had to designate a particular magistrate judge to hear the discovery dispute at issue.

Federal Rule of Civil Procedure 83(a) and 28 U.S.C. § 636(b)(4) gives district courts the power to enact local rules pursuant to which magistrate judges shall discharge their duties. Designations of magistrates under section 636 can be effectuated in either of two ways: by a specific order of reference in a particular case or generally by court-wide local rules or standing orders. *United States v. Auberg*, 2001 WL 987802, *2 (S.D. Ind. July 9, 2001). Local Rule 72 of the Eastern District of Virginia constitutes just such a general designation. The rule authorizes and designates magistrate judges in the district to hear matters like the dispute below:

> Magistrate judges of this District serve as judicial officers of the Court and are ***authorized and specially designated*** to perform all duties authorized or allowed to be performed by United States magistrate judges by the United States Code and any rule governing proceedings in this Court.

Local Rule 72 (emphasis added). This general designation conferred jurisdiction on the Magistrate Judge here, and therefore, he had jurisdiction to enter his April 30 Order.

B. Goodyear's Position Invites Chaos and Confusion in Courts Across the Country.

Other district courts, like the Eastern District of Virginia, have enacted local rules specifically and generally conferring jurisdiction on magistrate judges to hear pretrial matters, such as discovery issues, as permitted by 28 U.S.C. § 636(b)(1)(A). In fact, automatic referral of nondispositive motions to magistrates by local rule or standing order is common practice in federal district courts. *See In re*

Charlotte Observer, 882 F.2d 850, 851 (4th Cir. 1989) (recognizing standing order authorizing magistrate to hear and determine nondispositive discovery motions); *Wingerter v. Chester Quarry Co.*, 185 F.3d 657, 660-61 (7th Cir. 1998) (recognizing designation of magistrate judge to hear pre-trial matters occurs automatically by operation of lower court's local rule); *Strawbridge v. Sugar Mountain Resort, Inc.*, 243 F. Supp. 2d 472, 474-75 (W.D.N.C. 2003) (recognizing standing orders of designation to magistrate judges).

Moreover, this Court has upheld the automatic referral to magistrate judges for a report and recommendation in social security benefit cases based in part on Congress' recognition of the "avalanche of additional work" for the district courts. *Mathews v. Weber*, 423 U.S. 261, 268-69, 273 (1976). Here, the Magistrate Judge was referred a mundane discovery issue, which is governed by a clearly erroneous standard of review in the district court if a party files objections pursuant to Federal Rule 72. *See Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1414-15 (9th Cir. 1991), *cert denied*, 502 U.S. 994 (1991) (holding the delegation to a magistrate judge of the powers to decide a routine discovery matter was not an unconstitutional delegation of authority because of the clearly erroneous standard of review).

These local rules providing for automatic referral are well-established and efficiently govern pretrial procedures in the already overburdened United States district courts. *See, e.g.*, the following Local Rules authorizing and designating magistrate judges to perform the duties prescribed in the United States Code: Eastern District of Oklahoma Local Rule 72.1; Northern District of Ohio Local Rule 72.2; Eastern District of North Carolina Local Rule 72.2; Northern District of Indiana Local Rule 72.1; Middle District of Alabama Local Rule 72.2; Southern District of California Local Rule 72.2; Western District of Texas Local Rule 72; Southern District of Illinois Local Rule 72.1 (App. B-1 – B-25). Invalidating such local rules would unnecessarily burden courts across the country with all of the duties now handled effectively and

efficiently by magistrate judges. If the Court were to grant the relief Goodyear is seeking here, the Court's decision would be just the beginning of a wholesale alteration of the Federal Magistrates Act and the congressionally-granted authority of the district courts to manage their dockets. Goodyear has made no showing that such a wholesale alteration is warranted. *See Gomez v. United States*, 490 U.S. 858, 869-70 (1989) (recognizing that the magistrate system plays an integral role in the Federal Judicial System).

Due to the practice across the country of assigning cases to magistrate judges pursuant to local rules, the conflict Goodyear alleges between the Fourth and the Ninth Circuits is non-existent. In *Reynaga v. Cammisa*, 971 F.2d 414 (9th Cir. 1992), the court recognized that jurisdiction can be conferred on magistrate judges by specific ***or general*** orders. *See id.* at 415 n.1 (magistrate judge did not have jurisdiction because no order, "specific or general," authorizing magistrate to exercise jurisdiction existed). In any event, the facts of *Reynaga* are inapposite. The magistrate judge in *Reynaga* exceeded his statutory authority under 28 U.S.C. § 636 by entering an order effectively denying a request for an injunction. 971 F.2d at 416-17.

In its Petition, Goodyear fails to acknowledge the Eastern District of Virginia Local Rule 72 and the widespread practice of conferring jurisdiction upon magistrate judges by local rule. Goodyear also fails to offer any support why such rules are invalid. As such, the Petition should be denied; Goodyear should not be allowed to avoid its procedural mistake in failing to follow Federal Rule 72 at the expense of the Federal Magistrates Act, Local Rules of Procedure, and the authority of the district courts to manage their dockets.

C. The April 30 Order was Nondispositive, and Goodyear Failed to File Written Objections in the District Court.

Goodyear's contention that the April 30 Order was a dispositive Order is easily dismissed. The April 30 Order was nondispositive because it resolved a discovery issue. *Thomas E. Hoar, Inc. v. Sara Lee Corp.*, 900 F.2d 522, 525 (2d Cir. 1990) ("matters concerning discovery generally are considered 'nondispositive' of the litigation"). Goodyear responds that the Order was dispositive of all of the issues in this case. *See* Pet. at 11. But this is not an independent "case." It is a proceeding ancillary to an action pending in the United States District Court for the District of Colorado and it must be examined in the context of the main action. *See MDK, Inc. v. Mike's Train House, Inc.*, 27 F.3d 116, 121 (4th Cir. 1994), *cert denied*, 513 U.S. 1000 (1994). The Magistrate Judge's April 30 Order addressed only a discovery issue and did not resolve any substantive claim for relief in the Colorado action. As such, the April 30 Order is nondispositive. *See id.*

Indeed, the cases Goodyear cites actually support Malek's position. In *Am. Stock Exch. v. Mopex, Inc.*, 215 F.R.D. 87, 92 (S.D.N.Y. 2002), the court held that "[a] ruling is 'dispositive' if it resolves substantive claims for relief rather than mere issues in the litigation." *Id.* Here, the Magistrate Judge resolved no substantive claims for relief; he merely resolved a single discovery issue. Moreover, Goodyear relies on *NLRB v. Frazier*, 966 F.2d 812 (3d Cir. 1992), a case in which the defendant actually followed Federal Rule 72, to excuse Goodyear's failure to follow the same rule.

Goodyear also alleges a conflict between the unpublished decision here and another unpublished Fourth Circuit case. *Dixon v. Francis*, 2001 U.S. App. LEXIS 2774 (4th Cir. 2001), is inapposite. In *Dixon*, the magistrate judge entered a *dispositive* order. Here, the Magistrate Judge was specifically designated to exercise his statutory authority by

Local Rule 72 and 28 U.S.C. § 636, and he acted within that authority when he issued his nondispositive April 30 discovery order. Because the Magistrate Judge's April 30 Order was a nondispositive order, Goodyear had to file written objections to the District Court within 10 days. Fed.R.Civ.P. 72(a). By failing to file written objections, Goodyear waived its right to appeal. *See Thomas v. Arn*, 474 U.S. 140, 151-52 (1985) (holding appellate court could properly exercise its supervisory power to establish a rule that the failure of appellant to file objections to a magistrate judge's report waived the right to appellate review). *See also Wells v. Shriners Hosp.*, 109 F.3d 198, 201 (4th Cir. 1997).

Goodyear asserts that it filed a notice of appeal to the Fourth Circuit in the district court and that should be sufficient to meet its Federal Rule 72 obligation because it did not know where to file its objections. *See* Pet. at 13. But Goodyear filed its ancillary case in the Eastern District of Virginia, so surely, it could have filed its objections to the Magistrate Judge's Order in the same court. Moreover, this argument is completely undermined by Goodyear's actual filing of objections to the Magistrate Judge's November 21 Order lifting the stay. This latter filing is the best evidence that Goodyear could have filed objections in the district court to the Magistrate Judge's earlier April 30 Order, and the objections would have been assigned to a district judge. In other words, the fact that Goodyear had its appeal of the November 21 Order heard by a district judge demonstrates that it simply erred when it appealed the April 30 Order directly to the Fourth Circuit.

Goodyear asserts that a district court clerk is somehow responsible for Goodyear's noncompliance with Federal Rule 72. *See* Pet. at 13, 15. But it is not the clerk's duty to advise counsel of the local rules, or the reasons behind its case assignments. Attorneys themselves have a duty to investigate the local rules. *See E.I. DuPont de Nemours & Co. v. United States*, 15 F. Supp. 2d 859, 861-862 (Ct. Int'l Trade 1998) ("reliance on legal advice of clerk's office . . . does not justify

the untimely filing of notice of appeal because the Federal Rules and case law interpreting the rules are clear").

II. GOODYEAR'S INSERTION OF ITS ARGUMENT ON THE MERITS OF THE APRIL 30 ORDER DOES NOT ALTER THE PROCEDURAL NATURE OF THIS CASE, CORRECTLY DECIDED BY THE FOURTH CIRCUIT.

Goodyear's argument that this appeal is cert-worthy is based partially on its unhappiness with the underlying April 30 Order. *See* Pet. at 18-21. In a clever feint, Goodyear seeks to argue the privilege issues involved in the April 30 Order to avoid facing its procedural error. But the Fourth Circuit did not address any of those issues and none of them is presented here. Rather, the Fourth Circuit held only that Goodyear's failure to file its written objections to the April 30 Order pursuant to Federal Rule 72 precluded appellate jurisdiction. Therefore, these arguments are irrelevant in determining the jurisdictional issues involved in this appeal.

Moreover, Goodyear erroneously contends that it will forever lose its right to appeal from the April 30 Order if the Petition is denied. In fact, if any of the documents at issue are used at trial in the Colorado litigation, and if an adverse judgment is entered against Goodyear, Goodyear will be entitled to raise on appeal its objections to any use of such documents. *See Boughton v. Cotter Corp.*, 10 F.3d 746, 749 (10th Cir. 1993) (if privileged documents are wrongly produced, any adverse judgment can be reversed, and the parties forbidden use of the documents on retrial).

Additionally, Goodyear fails to recognize that it is not entitled to an appeal in the Fourth Circuit from the April 30 Order. Even if Goodyear had followed Federal Rule 72, the April 30 Order is not a final, appealable order, and the Fourth Circuit does not invoke the collateral order doctrine to review appeals from discovery orders, even those involving claims of privilege. *See MDK*, 27 F.3d at 119-21 & n.2; *Simmons v.*

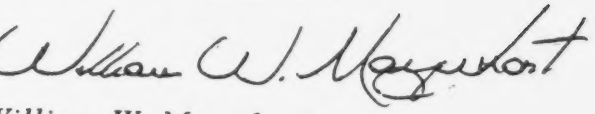
City of Racine, 37 F.3d 325, 327 (7th Cir. 1994) (discovery orders issued over an objection based on privilege are generally not appealable); *Boughton*, 10 F.3d at 749-50 (stating that in virtually every case, other circuits have held that orders compelling disclosure of information claimed to be subject to the attorney-client privilege are not reviewable as collateral orders) (citing cases); *A-Mark Auction Galleries, Inc. v. Am. Numismatic Assoc.*, 233 F.3d 895, 897-99 (5th Cir. 2000) (relying on *MDK*, court held that a discovery order issued by a Texas federal district court was not a final order under 28 U.S.C. § 1291 because it was ancillary to the main case pending in Colorado).

Lastly, Goodyear states that "the parties agreed to have Goodyear's Motion to Quash in Malek listed for hearing on March 21, 2003," which resulted in the April 30 Order. *See* Pet. at 15. Goodyear never raised its jurisdictional challenges at that time. Only after losing on the merits pursuant to the April 30 Order did Goodyear raise its jurisdictional challenges in response to Malek's motion to dismiss in the Fourth Circuit. Because (1) Goodyear's jurisdictional challenges are a thinly-veiled effort to avoid its procedural mistake, (2) Goodyear retains a right to raise its challenges to the use of any of the subpoenaed documents in an appeal from an adverse judgment in the main litigation in the District Court of Colorado, and (3) ultimately Goodyear has no right to appeal from the April 30 Order in the Fourth Circuit, the issues raised in the Petition are procedural only and do not warrant certiorari.

CONCLUSION

The Petition should be denied.

Respectfully submitted,



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APPENDIX

A-1

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

THE GOODYEAR TIRE & RUBBER CO.,)

Plaintiff,)

v. CIVIL ACTION NO. 03-MC-8
)

FREDERIC V. MALEK,)
)

Defendant.)

ORDER

For the reasons stated from the bench, and in accord with specific rulings thereto, it is

ORDERED,

Defendant's Motion to Lift Stay is GRANTED. This Order will be STAYED for a period of twenty-one (21) days.

Entered this 21st day of November, 2003.

/s/ Barry R. Poretz
Barry R. Poretz
United States Magistrate Judge

Alexandria, Virginia

WEST'S OKLAHOMA COURT RULES AND PROCEDURE

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA LOCAL CIVIL RULES OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

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Current with amendments received through 11/1/2002

LOCAL RULE 72.1 MAGISTRATE JUDGES

A. Authorization and Duties. All Magistrate Judges duly appointed and acting as such in this District are designated and authorized to perform the duties prescribed by 28 U.S.C. §§ 636(a)(1), (2), and (3); (b)(1)(A), (B), and (C); (b)(2); and (b)(3).

B. Civil Cases--Non-dispositive Pretrial Matters. Pursuant to 28 U.S.C. § 636(b)(1)(A), a District Judge may designate a Magistrate Judge to hear and determine any pretrial matter in any pending civil action, except for the following motions:

1. For injunctive relief,

2. For judgment on the pleadings;

3. For summary judgment;

4. To dismiss; and

5. To permit maintenance of class action.

The Magistrate Judge shall announce in open court, or file his or her report and recommendations with the Court Clerk. Any party objecting to the Magistrate Judge's oral findings or report and recommendation may file objections within ten (10) days after the oral findings are announced or

report and recommendation is served. Objections shall be accompanied by a brief which sets forth with particularity the grounds for the objection. Any objections not so made shall be deemed waived, and the Court will enter such order as it deems appropriate.

C. Civil Cases--Dispositive Matters. Pursuant to 28 U.S.C. § 636(b)(1)(B), a District Judge may designate a Magistrate Judge to conduct hearings, including evidentiary hearings, and to submit proposed findings of fact and recommendations for the disposition of any of the motions excepted from Rule 72.1(B). The Magistrate Judge shall file his proposed findings and recommendations with the Court, mailing copies thereof to all parties who shall have ten (10) days after service thereof to serve and file specific written objections thereto. If no such objections are filed, the Magistrate Judge's findings and recommendations may be accepted by the District Judge and appropriate orders entered without further notice.

D. Service as Special Master. Pursuant to 28 U.S.C. § 636(b)(2), a District Judge may designate a Magistrate Judge to serve as a Special Master in any civil case, upon consent of the parties. The Magistrate Judge shall then proceed according to Rule 53, Federal Rules of Civil Procedure. In the absence of the consent of the parties, the appointment of a Magistrate Judge as a Special Master may be made only upon a showing of the exceptional conditions required by Rule 53(b), Federal Rules of Civil Procedure.

[Effective October 1, 1996.]

U.S. Dist. Ct. Rules E.D.Okl., EDOK LR 72.1-Civil

OK R USDCTED EDOK LR 72.1-Civil

END OF DOCUMENT

WEST'S OHIO RULES OF COURT

LOCAL RULES FOR THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

LOCAL CIVIL RULES
CHAPTER IX. SPECIAL PROCEEDINGS

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Current with amendments received through 1/1/2003

RULE 72.2 ASSIGNMENT AND REFERRAL OF MATTERS TO MAGISTRATE JUDGES

(a) General. The method for assignment of duties to a Magistrate Judge and for the allocation of duties among the several Magistrate Judges of this Court shall be made in accordance with orders of the Court or by special designation of a District Judge.

(b) Automatic Reference. The Clerk shall refer all cases in the following categories to a Magistrate Judge for a Report and Recommendation as provided in Local Rule 72.1(e):

(1) Petitions for review of administrative decisions (including Social Security, Black Lung and Civil Service);

(2) Pro se petitions for habeas corpus filed under 28 U.S.C. § 2254, provided such petition has first been reviewed by the Court pursuant to 28 U.S.C. § 1915(d) and Rule 4 of the Rules Governing § 2254 Cases and a decision has been made to require a response to the petition.

(3) Administrative Cases under Local Rule 16.2(a).

(See LCrR 5.2 and 35.1)

[Effective January 1, 1992; amended effective June 9, 1992; amended and renumbered April 7, 1997.]

U.S. Dist. Ct. Rules N.D.Ohio, LR 72.2

OH R USDCTND LR 72.2

END OF DOCUMENT

WEST'S NORTH CAROLINA RULES OF COURT

LOCAL RULES OF PRACTICE AND PROCEDURE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

I. CIVIL RULES

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Current with amendments received through 9/1/2003.

RULE 72.2 MAGISTRATE JUDGES: ASSIGNMENTS OF MATTERS

(a) Civil Cases. Upon filing, all civil cases shall be assigned by the clerk to a magistrate judge for the conduct of such discovery and pre-trial conferences as are necessary and for the hearing and determination of all pre-trial procedural and discovery motions, in accordance with Local Rule 72.4(b). Where designated by a judge, the magistrate judge may conduct additional pre-trial conferences and hear motions and perform the duties set forth in Local Rules 72.4(c), 72.4(d) and 72.4(e). Where the parties consent to trial and disposition of a case by a certified magistrate judge under Local Rule 73.1, such case shall, with the approval of the judge to whom it was assigned at the time of filing, be reassigned to a certified magistrate judge for the conduct of all further proceedings and the entry of judgment.

(b) General. Nothing in these local rules shall preclude a judge from reserving any proceeding for conduct by a judge, rather than a magistrate judge. The judge, moreover, may by order modify the method of assigning proceedings to a magistrate judge as changing conditions may warrant.

[Effective January 1, 2003.]

U.S. Dist. Ct. Rules E.D.N.C., Civil Local Rule 72.2

NC R USDCTED CIV Local Rule 72.2

END OF DOCUMENT

WEST'S INDIANA RULES OF COURT

LOCAL RULES OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA

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Current with amendments received through 10/1/2002

L.R. 72.1 AUTHORITY OF UNITED STATES MAGISTRATE JUDGES

Unless otherwise provided in these Rules, the term "United States Magistrate Judge" shall include full-time magistrate judges, part-time magistrate judges and magistrate judges recalled pursuant to 28 U.S.C. § 636(h).

(a) Duties under 28 U.S.C. §§ 636(a)(1) and (2). Each United States magistrate judge of this court is authorized to perform the duties prescribed by 28 U.S.C. §§ 636(a)(1) and (2), and may exercise all the powers and duties conferred upon United States magistrate judges by statutes of the United States and the Federal Rules of Criminal Procedure which include, but are not limited to, the following:

(1) Acceptance of criminal complaints and issuance of arrest warrants or summonses. (Fed.R.Crim.P. 4.)

(2) Issuance of search warrants, including warrants based upon oral or telephonic testimony. (Fed.R.Crim.P. 41.)

(3) Conduct of initial appearance proceedings for defendants, informing them of the charges against them and of their rights, and imposing conditions of release. (Fed.R.Crim.P. 5.)

(4) Conduct of initial proceedings upon the appearance of an individual accused of an act of juvenile delinquency. (18 U.S.C. § 5034.)

(5) Appointment of attorneys for defendants who are unable to afford or obtain counsel and approval of attorneys' expense vouchers in appropriate cases. (18 U.S.C. § 3006A.)

(6) Appointment of counsel for persons subject to revocation of probation, parole or supervised release (in which case preference shall be given to previously appointed counsel if such attorney is still available and willing to serve); persons in custody as a material witness; persons seeking relief under 28 U.S.C. §§ 2241, 2254, or 2255 or 18 U.S.C. § 4245; or for any person for whom the Sixth Amendment to the Constitution requires the appointment of counsel or for whom, in a case in which the person faces loss of liberty, any federal law requires the appointment of counsel.

(7) Appointment of interpreters in cases initiated by the United States. (28 U.S.C. §§ 1827 and 1828.)

(8) Direction of the payment of basic transportation and subsistence expenses for defendants financially unable to bear the costs of travel to required court appearances. (18 U.S.C. § 4285.)

(9) Setting of bail for material witnesses. (18 U.S.C. § 3149.)

(10) Conduct of preliminary examinations. (Fed.R.Crim.P. 5.1 and 18 U.S.C. § 3060.)

(11) Conduct of initial proceedings for defendants charged with criminal offenses in other districts. Fed.R.Crim.P. 40.)

(12) Conduct of detention hearings. (18 U.S.C. § 3142(f).)

(13) Conduct of preliminary hearings for the purpose of determining whether there is probable cause to hold a probationer for a revocation hearing. (Fed.R.Crim.P. 32.1(a)(1).)

(14) Administration of oaths and taking of bail, acknowledgements, affidavits and depositions. (28 U.S.C. § 636(a)(2).)

(15) Conduct of extradition proceedings. (18 U.S.C. § 3184.)

(16) Holding of individuals for security of the peace and for good behavior. (50 U.S.C. § 23.)

(17) Discharge of indigent prisoners or persons imprisoned for debt under process of execution issued by a federal court. (18 U.S.C. § 3569 and 28 U.S.C. § 2007.)

(18) Issuance of attachments or orders to enforce obedience of Internal Revenue Service summonses to produce records or give testimony. (26 U.S.C. § 7604(b).)

(19) Issuance of administrative inspection warrants. (In the Matter of Establishment Inspection of Gilbert and Bennett Manufacturing Co., 589 F.2d 1335, 1340-41 [7th Cir. 1979].)

(20) Institution of proceedings against persons violating certain civil rights statutes. (42 U.S.C. § 1987.)

(21) Settling or certification of the non-payment of seamen's wages. (46 U.S.C. § 603.)

(22) Enforcement of awards of foreign consuls in differences between captains and crews of vessels of the consul's nation. (22 U.S.C. § 258(a).)

(23) Conduct of proceedings under the Federal Debt Collection Act to the extent not inconsistent with the Constitution and laws of the United States. (28 U.S.C. § 3008.)

(b) Disposition of Misdemeanor Cases--18 U.S.C. § 3401. A magistrate judge may:

(1) Conduct the trial of persons accused of, and sentence persons convicted of, misdemeanors, including petty offenses committed within this district. Pursuant to 18 U.S.C. § 3401(a), each magistrate judge is hereby specially designated to exercise the jurisdiction conferred by such section with the written consent of the defendant as provided in 18 U.S.C. § 3401(b); such trial shall be by jury in the case of all Class A misdemeanors unless waived in writing by the defendant;

(2) Direct the probation service of the court to conduct a pre-sentence investigation in any misdemeanor case. Any appeal from the judgment of the magistrate judge shall be as provided in 18 U.S.C. § 3402.

(c) Determination of Non-Dispositive Pre-trial Matters--28 U.S.C. § 636(b)(1)(A). A magistrate judge may hear and determine any procedural or discovery motion or other motion or pre-trial matter in a civil or criminal case, other than the motions which are specified in Local Rule 72.1(d) of these rules, in accordance with Fed. R. Civ. P. 72(a).

(d) Recommendation Regarding Case-Dispositive Motions--28 U.S.C. § 636(b)(1)(B).

(1) A magistrate judge may submit to a district judge of the court a report containing proposed findings of fact and recommendations for disposition by the judge of the following pre-trial motions in civil and criminal cases in accordance with Fed.R.Civ.P. 72(b):

(A) Motions for injunctive relief, including temporary restraining orders and preliminary and permanent injunctions;

(B) Motions for judgment on the pleadings;

(C) Motions for summary judgment;

(D) Motions to dismiss or permit the maintenance of a class action;

(E) Motions under Fed. R. Civ. P. 72(a);

(F) Motions to involuntarily dismiss an action;

(G) Motions for review of default judgments;

(H) Motions to dismiss or quash an indictment or information made by a defendant;

(I) Motions to suppress evidence in a criminal case;

(J) Applications for post-trial relief made by individuals convicted of criminal offenses;

(K) Petitions for judicial review of administrative decisions regarding the granting of benefits to claimants under the Social Security Act, and related statutes;

(L) Petitions for judicial review of an administrative award or denial of licenses or similar privileges.

(2) Any objections to the magistrate judge's report and recommendation shall be filed with the clerk in accordance with 28 U.S.C. § 636(b)(1), and failure to file timely objections within the ten (10) day period set forth therein shall constitute a waiver of subsequent review absent a showing of good cause for such failure.

(3) A magistrate judge may determine any preliminary matter and conduct any necessary evidentiary hearing or other proceeding arising in the exercise of the authority conferred by this subsection.

(e) Prisoner Cases under 28 U.S.C. § 2254 and 2255. A magistrate judge may perform any or all the duties imposed upon a judge by the rules governing proceedings in the United States District Court under §§ 2254 and 2255 of

Title 28, United States Code. In so doing, a magistrate judge may issue any preliminary orders and conduct any necessary evidentiary hearing or other appropriate proceeding and shall submit to a district judge a report containing proposed findings of fact and recommendations for disposition of the petition by the judge. Any order disposing of the petition may only be made by a judge. In the event no hearing is held by the magistrate judge, the magistrate judge may, pursuant to 28 U.S.C. § 636(b)(3) acting as legal advisor to the district judge, submit to the judge a proposed entry ruling on the motion. If the district judge so directs, copies of such proposed ruling need not be served on the parties of counsel.

(f) Prisoner Cases under 42 U.S.C. § 1983. A magistrate judge may:

(1) Review prisoner suits for deprivation of civil rights arising out of conditions of confinement under § 1983 of Title 42, United States Code and issue any preliminary orders and conduct any necessary evidentiary hearing or other appropriate proceeding and shall submit to a judge a report containing proposed findings of fact and recommendations for the disposition of the suits by the district judge. Any order disposing of prisoner suits challenging the conditions of their confinement may only be made by a district judge.

(2) Take on-site depositions, gather evidence, conduct pretrial conferences, or serve as a mediator at a holding facility in connection with civil rights suits filed by prisoners contesting conditions of confinement under § 1983 of Title 42, United States Code.

(3) Conduct periodic reviews of proceedings to ensure compliance with previous orders of the court regarding conditions of confinement.

(4) Review prisoner correspondence.

(g) Special Master References--28 U.S.C. § 636(b)(2). A magistrate judge may be designated by a

district judge to serve as a special master in appropriate civil cases in accordance with 28 U.S.C. § 636(b)(2) and Fed. R. Civ. P. 53. Upon the consent of the parties, a magistrate judge may be designated by a judge to serve as a special master in any civil case, notwithstanding the limitations of Fed. R. Civ. P. 53(b).

(h) Conduct of Trials and Disposition of Civil Cases Upon Consent of the Parties--28 U.S.C. § 636(c). Upon the consent of the parties, a full-time magistrate judge is hereby authorized and specially designated to conduct any or all proceedings in any civil case which is filed in this court, including the conduct of a jury or non-jury trial, and may order the entry of a final judgment, in accordance with 28 U.S.C. § 636(c) and Fed. R. Civ. P. 73. Pursuant to 28 U.S.C. § 636(c)(1), upon the consent of the parties, pursuant to their specific written request, and upon certification by the chief judge of this court that a full-time magistrate judge is not reasonably available in accordance with guidelines established by the judicial council of the circuit, any part-time magistrate judge who does not serve as a full-time judicial officer but who meets the bar requirements set forth in 28 U.S.C. § 631(b)(1), is hereby authorized and specifically designated by this court to conduct any or all proceedings in a civil case, whether jury or non jury. In the course of conducting such proceedings, upon consent of the parties, a magistrate judge may hear and determine any and all pre-trial and post-trial motions which are filed by the parties, including case-dispositive motions.

(i) Additional Duties--28 U.S.C. § 636(b)(3). A magistrate judge of this court is also authorized to:

(1) Exercise general supervision of civil and criminal calendars, including the handling of calendar and status calls, and motions to expedite or postpone the trial of cases for the district judges;

(2) Conduct preliminary and final pre-trial conferences, status calls, settlement conferences, and related pre-trial proceedings in civil cases, and prepare a pre-trial order following the conclusion of the final pre-trial conference;

(3) Conduct pre-trial conferences, omnibus hearings, and related pre-trial proceedings in criminal cases;

(4) Conduct arraignments, accept not guilty pleas, and order pre-sentence reports on defendants who signify the desire to plead guilty. (A magistrate judge, however, may not accept pleas of guilty or nolo contendere in cases outside the jurisdiction specified in 18 U.S.C. § 3401);

(5) Receive grand jury returns in accordance with Fed. R. Crim. P. 6(f);

(6) Accept waivers of indictment, pursuant to Fed. R. Crim. P. 7(b);

(7) Issue subpoenas, writs of habeas corpus ad testificandum or habeas corpus ad prosequendum, or other orders necessary to obtain the presence of parties, witnesses or evidence needed for court proceedings;

(8) Hear and determine motions by the government to dismiss an indictment, information, or complaint without prejudice to further proceedings;

(9) Conduct voir dire and select petit juries in civil cases for the court;

(10) Accept petit jury verdicts in civil cases in the absence or unavailability of a judge;

(11) Order the exoneration or forfeiture of bonds;

(12) Conduct proceedings for the collection of civil penalties of not more than $200.00 assessed under the Federal

Boat Safety Act of 1971 in accordance with 46 U.S.C. §§ 4311(d), 12309;

(13) Conduct examinations of judgment debtors in accordance with Fed. R. Civ. P. 69;

(14) Serve as eminent domain commissioner as provided in Fed. R. Civ. P. 71A;

(15) Perform the functions specified in 18 U.S.C. §§ 4107, 4108 and 4109, regarding proceedings for verification of consent by offenders to transfer to or from the United States and the appointment of counsel therein;

(16) Serve as a member of this District's Speedy Trial Act Planning Group, including service as the reporter (18 U.S.C. § 1368);

(17) Supervise proceedings on requests for letters rogatory in civil and criminal cases upon special designation by the district court as required under 28 U.S.C. § 1782(a);

(18) Hear and determine applications for admission to practice before this District Court;

(19) Preside over naturalization ceremonies and administer the oath of renunciation and allegiance required by 8 U.S.C § 1448(a). Following these ceremonies, a magistrate judge shall submit to a judge of this court a report containing the names of applicants who took the oaths administered. (A magistrate judge may not conduct final hearings or preliminary examinations of petitioners or witnesses, as those functions are expressly vested in naturalization examiners or in judges by 8 U.S.C. §§ 1447(a) and (b)); and

(20) Conduct proceedings supplemental; and

(21) Perform any additional duty as is not contrary to the law of this District and Circuit nor inconsistent with the Constitution and laws of the United States.

(j) Assignment of Matters to Magistrate Judge. The cases in which each magistrate judge is authorized to perform the duties enumerated in these rules are those cases assigned to the magistrate judge by rule or order of this court, or by order or special designation of any district judge of this court.

[Adopted effective January 1, 1994; amended effective October 2, 2000; January 1, 2002.]

U.S. Dist. Ct. Rules N.D.Ind., L.R. 72.1

IN R USDCTND L.R. 72.1

END OF DOCUMENT

WEST'S ALABAMA RULES OF COURT

LOCAL RULES FOR THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

PART I. CIVIL RULES AND GENERAL PROVISIONS
IX. SPECIAL PROCEEDINGS

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Current with amendments received through 5-1-2003

LOCAL RULE 72.2 ASSIGNMENT OF DUTIES TO MAGISTRATE JUDGES

The full-time Magistrate Judges of this court are authorized to exercise all powers and perform all duties authorized by 28 U.S.C. § 636(a) and (b), including all duties not inconsistent with the Constitution and laws of the United States.

[Effective January 1, 1998.]

U.S. Dist. Ct. Rules M.D.Ala., LR 72.2

AL R USDCTMD LR 72.2

END OF DOCUMENT

WEST'S CALIFORNIA LOCAL COURT RULES PAMPHLETS AND WEST'S CALIFORNIA RULES OF COURT

LOCAL RULES OF PRACTICE FOR THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CIVIL LOCAL RULES JURIES

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Current with amendments received through June 1, 2003

CIVIL RULE 72.2 ASSIGNMENT AND DESIGNATION PROCEDURES

a. Order of Designation and Assignment. A matter assigned to the magistrate judges either as a matter of course by the clerk of the United States District Court or by an order of special designation by a district judge of the court under 28 U.S.C. § 636(b) or (c), precisely stating the nature of the matter, shall be assigned to a specific magistrate judge as follows:

b. Civil Matters. The clerk shall assign civil matters by lot as described in Civil Local Rule 40.1. In civil matters where reference to a magistrate judge is dependent upon the consent of the parties, such as trials, the district judge may assign the matter to a particular magistrate judge selected by the parties.

c. Assignment of Cases. [FN*] Upon filing, civil cases shall be assigned by the clerk to a magistrate judge. The magistrate judge shall hear and determine Civil Local Rule 72.1.b pretrial motions.

d. Designated Duties. [FN*] Where designated by a judge the magistrate judge may conduct additional pre-trial

conferences and hear motions and perform the duties set forth in Civil Local Rule 72.1.c.

e. Prisoner Cases. [FN*] Each magistrate judge shall be designated to perform the duties set forth in Civil Local Rule 72.1.d.

f. Case Set Before Magistrate Judge. [FN*] Where the parties consent to trial and disposition of a case by a magistrate judge under Civil Local Rule 72.1.f of these rules, such case shall set before the magistrate judge for the conduct of all further proceedings and the entry of judgment.

g. Notice of Hearing. A magistrate judge assigned a matter shall set the time of hearing, notify all parties and make any further necessary orders consistent with the requirements of the local rules of court for the Southern District.

h. Assignment of Proceedings. [FN*] Nothing in these rules shall preclude the court, or a district judge from reserving any proceedings for conduct by a district judge, rather than a magistrate judge. The court, moreover, may by general order modify the method of assigning proceedings to a magistrate judge as changing conditions may warrant.

Eff. Aug. 18, 1997.

FN* Suggested title added by publisher.

U.S. Dist. Ct. Rules S.D.Cal., CivLR 72.2

CA R USDCTSD CivLR 72.2

END OF DOCUMENT

WEST'S TEXAS RULES OF COURT

LOCAL COURT RULES OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

SECTION I. CIVIL RULES

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Current with amendments received through 2/1/2003

RULE CV-72. MAGISTRATE JUDGES, PRETRIAL MATTERS

The magistrate judges of this Court are authorized to perform all the duties allowed to magistrate judges under the Federal Magistrates Act as amended in 28 United States Code § 636. The magistrate judges of this court are designated to exercise civil jurisdiction under section 636(c)(1) upon consent of the parties. Whenever applicable, the "Local Rules of the Assignment of Duties to United States Magistrate Judges" found at Appendix "C" herein, shall apply to proceedings before the magistrate judges.

[Effective January 1, 1994.]

U.S. Dist. Ct. Rules W.D.Tex., Rule CV-72

TX R USDCTWD Rule CV-72

END OF DOCUMENT

WEST'S ILLINOIS COURT RULES AND PROCEDURE--
VOLUMES I, II AND III

LOCAL RULES OF THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

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Current with amendments received through April 15, 2003

RULE 72.1 AUTHORITY OF UNITED STATES MAGISTRATE JUDGES

(28 U.S.C. § 636, et seq.; 28 U.S.C. §§ 1331, 2241, 2254, 2255; 18 U.S.C. § 3401; 42 U.S.C. § 1983)

(a) Duties Under 28 U.S.C. § 636(a). Each United States Magistrate Judge of this Court is authorized to perform the duties prescribed by 28 U.S.C. § 636(a), and may:

(1) exercise all the powers and duties conferred or imposed upon United States Commissioners by law and the Federal Rules of Criminal Procedure;

(2) administer oaths and affirmations, impose conditions of release under 18 U.S.C. § 3146, and take acknowledgments, affidavits, and depositions; and

(3) conduct extradition proceedings in accordance with 18 U.S.C. § 3184.

(b) Disposition of Misdemeanor Cases--18 U.S.C. § 3401. A Magistrate Judge may, either upon automatic reference pursuant to Local Rule 72.2(a) or upon specific reference by the assigned U.S. District Judge:

(1) try persons accused of, and sentence persons convicted of, misdemeanors committed within this District in accordance with 18 U.S.C. § 3401;

(2) direct the probation service of the Court to conduct a pre-sentence investigation in any misdemeanor case; and

(3) conduct a jury trial in any misdemeanor case where the defendant so requests and is entitled to trial by jury under the Constitution and laws of the United States.

(c) Determination of Non-Dispositive Pre-trial Matters--28 U.S.C. § 636(b)(1)(A). A Magistrate Judge may hear and determine any procedural or discovery motion or other pre-trial matter in a civil or criminal case, other than the motions which are specified in sub-section 72.1(d), infra, of these rules. See also Local Rule 72.2(a)(1).

(d) Recommendations Regarding Case-Dispositive Motions--28 U.S.C. § 636(b)(1)(B).

(1) A Magistrate Judge may submit to a District Judge of the Court a report containing proposed findings of fact and recommendations for disposition by the District Judge of the following pre-trial motions in civil and criminal cases:

(i) motions for injunctive relief, including temporary restraining orders and preliminary and permanent injunctions;

(ii) motions for judgment on the pleadings;

(iii) motions for summary judgment;

(iv) motions to dismiss or permit the maintenance of a class action;

(v) motions to dismiss for failure to state a claim upon which relief may be granted;

(vi) motions to involuntarily dismiss an action;

(vii) motions for review of default judgments;

(viii) motions to dismiss or quash an indictment or information made by a defendant; and

(ix) motions to suppress evidence in a criminal case.

(2) A Magistrate Judge may determine any preliminary matters and conduct any necessary evidentiary hearing or other proceedings arising in the exercise of the authority conferred by this sub-section.

(e) Prisoner Cases Under 28 U.S.C. §§ 1331, 2241, 2254 and 2255. A Magistrate Judge may perform any or all of the duties imposed upon a District Judge by the rules governing proceedings in the United States District Courts under § 1331, § 2241, § 2254 and § 2255 of Title 28, United States Code. In so doing, a Magistrate Judge may issue any preliminary orders and conduct any necessary evidentiary hearing or other appropriate proceedings and shall submit to a District Judge a report containing proposed findings of fact and recommendations for disposition of the petition by the Judge. Any order disposing of the petition may only be made by a Judge, unless the parties otherwise consent as provided by 28 U.S.C. § 636(c) and Local Rule 72.1(h).

(f) Prisoner Cases Under 42 U.S.C. § 1983. A Magistrate Judge may issue any preliminary orders and conduct any necessary evidentiary hearing or other appropriate proceedings and shall submit to a District Judge a report containing proposed findings of fact and recommendations for the disposition of petitions filed by prisoners challenging the conditions of their confinement.

(g) Special Master References. A Magistrate Judge may be designated by a District Judge to serve as a special master in appropriate civil cases in accordance with 28 U.S.C. § 636(b)(2) and Rule 53 of the Federal Rules of Civil Procedure. Upon the consent of the parties, a Magistrate Judge may be designated by a District Judge to serve as a

special master in any civil case, notwithstanding the limitations of Rule 53(b) of the Federal Rules of Civil Procedure.

(h) Conduct of Trials and Disposition of Civil Cases Upon Consent of the Parties--28 U.S.C. § 636(c). Upon the consent of the parties, a full-time Magistrate Judge may conduct any or all proceedings in any civil case which is filed in this Court, including the conduct of a jury or non jury trial, and may order the entry of a final judgment, in accordance with 28 U.S.C. § 636(c). In the course of conducting such proceedings upon consent of the parties, a Magistrate Judge may hear and determine any and all pre-trial and post-trial motions which are filed by the parties, including case-dispositive motions.

(i) Other Duties. A Magistrate Judge is also authorized to:

(1) exercise general supervision of civil and criminal calendars and conduct calendar and status calls on behalf of a District Judge;

(2) conduct pre-trial conferences, settlement conferences, omnibus hearings, and related pre-trial proceedings in civil and criminal cases;

(3) conduct arraignments in criminal cases not friable by the Magistrate Judge and take "not guilty" pleas in such cases;

(4) receive grand jury returns in accordance with Rule 6(f) of the Federal Rules of Criminal Procedure;

(5) accept waivers of indictment, pursuant to Rule 7(b) of the Federal Rules of Criminal Procedure;

(6) conduct voir dire and select civil petit juries for the Court;

(7) accept petit jury verdicts in civil cases in the absence of a District Judge;

(8) conduct necessary proceedings leading to the potential revocation of probation;

(9) issue subpoenas, writs of habeas corpus ad testificandum or habeas corpus ad prosequendum, or other orders necessary to obtain the presence of parties, witnesses or evidence needed for court proceedings;

(10) order the exoneration or forfeiture of bonds;

(11) conduct proceedings for the collection of civil penalties of not more than $200 assessed in accordance with 46 U.S.C. § 4311(d) and 46 U.S.C. § 12309(c);

(12) conduct examinations of judgment debtors in accordance with Rule 69 of the Federal Rules of Civil Procedure;

(13) conduct proceedings for initial commitment of narcotic addicts under Title III of the Narcotic Addict Rehabilitation Act; and

(14) perform the functions specified in 18 U.S.C. §§ 4107, 4108, and 4109, regarding proceedings for verification of consent by offenders to transfer to or from the United States and the appointment of counsel therein;

(15) conduct examination of claims for attorneys' fees and related nontaxable expenses in accordance with Rule 54(d)(2)(D) of the Federal Rules of Civil Procedure.

Eff. March 1, 1999.

U.S. Dist. Ct. Rules S.D.Ill., Rule 72.1

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